89-1007

Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1989

JOHN T. OXLEY,
Petitioner,

vs.

CITY OF TULSA, OKLAHOMA, a municipal corporation, by and through the TULSA AIRPORT AUTHORITY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

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December 19, 1989

QUESTIONS PRESENTED

1. Whether extreme and disruptive noise, overflights, fumes, and vibrations which render land useless for residential purposes, effectuate a compensable governmental taking of any protected interest in real property.[1]

2. Whether extreme and disruptive noise, overflights, fumes, and vibrations which render land useless for residential purposes, combined with a municipality's unreasonable and discriminatory conduct which precludes a landowner from developing his property for commercial and light industrial purposes and in a manner consistent with both its zoning and the surrounding uses in the area, effectuate a compensable taking of any protected interest in real property.

3. Whether a compensable taking of a protected interest in real property occurs by virtue of a municipality's repeated and unequivocal expressions of an intent to acquire private property for public purposes, combined with (1) the admitted implementation of the plan which proposes the means for the acquisition of that property, on a first priority basis, for its ultimate development in a manner identical to that proposed by the landowner, and (2) the municipality's illegal, discriminatory, and unreasonable, overly regulatory, conduct which does not substantially advance legitimate state interests and which discriminatorily denied to the petitioner access to public airport runways.

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1. The parties identified in the caption of the case in this Court are the only parties to the litigation. The parties will be referred to throughout this Petition as "Oxley" and "the city."

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CITY OF TULSA, OKLAHOMA, a municipal corporation, by and through the TULSA AIRPORT AUTHORITY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

The petitioner John T. Oxley respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Oklahoma, entered in the above entitled proceeding on March 28, 1989, rehearing denied on September 21, 1989.

REPORTED OPINION

The opinion of the Supreme Court of Oklahoma rendered March 28, 1989, is reprinted in the Appendix hereto at p. A1, *infra*. The opinion, originally published in the Oklahoma Bar Journal at 60 O.B.J. 808 (S. Ct. Okla., #67016), does not yet appear in West's Pacific Reporter. Petitioner's request for rehearing was denied by the Okla-

homa Supreme Court on September 21, 1989. A copy of the unpublished Order denying rehearing is appended hereto.

STATEMENT OF JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

Based on a theory of de facto taking, the petitioner sought damages under the just compensation clauses of United States and Oklahoma Constitutions. A jury returned a verdict that no "taking" had occurred. The opinion of the Supreme Court of Oklahoma, denying the relief requested by the Petitioner, was rendered on March 28, 1989. *See* p. A1, *infra*. Petitioner's request for rehearing was subsequently denied on September 21, 1989. *See* p. A14, *infra*.

The statutes conferring jurisdiction on this Court are 28 U.S.C. §1257(3) and §2101(c) (1982).

CONSTITUTIONAL PROVISIONS, STATUTES, ZONING AND REGULATORY PROVISIONS INVOLVED

1. U.S. CONST. amend IV. *See* p. A15, *infra*.
2. U.S. CONST. amend XIV. *See* p. A15, *infra*.
3. Okla. Const. Art. II, §7. *See* p. A16, *infra*.
4. Okla. Stat. Tit. 66, §§51-55, 57. *See* pp. A16-A18, *infra*.
5. Okla. Stat. Tit. 27, §13. *See* pp. A18-A20, *infra*.
6. City of Tulsa Master Plan. *SEe* pp. A21-A22, *infra*.
7. City of Tulsa Airport Noise Control and Land Use Compatibility Study (ANCLUC). *See* pp. A23-A44, *infra*.

STATEMENT OF THE CASE AND MATERIAL FACTS

This action was instituted seeking recovery of damages based on a theory of inverse condemnation. The district court trifurcated the action into three phases. Phase one would determine whether the noise, fumes, vibrations, and overflights associated with the operation of Tulsa International Airport (hereinafter collectively referred to as airport conditions), had substantially interfered with any protected property interest. Phase two would determine the extent of the interference; that is, whether an avigation easement or fee simple interest had been appropriated. Phase three would determine the compensation to be paid.

Phase one was to be tried on the theory that airport conditions had appropriated some recognized and protected property interest and that Oxley was entitled to compensation. The scope of inquiry was broadened when the district court was compelled to reverse its in limine ruling that evidence of anti-competitive conduct would be admissible only in phase two to determine the extent of the taking. Thus, evidence of anti-competitive conduct was presented to the jury for its determination as to whether there had been a substantial interference with any recognized and protected property interest.

In 1951, Oxley purchased a sixty-four acre (more or less) tract of land located near Tulsa International Airport. At that time, the property was located adjacent to a golf course. By virtue of airport expansion, the land is now located adjacent to the airport's major, and eastern-most, north-south runway (17L/35R), borders the airport, and is, essentially, the only remaining peninsula of privately owned property between the major runway (17L/35R) and

the shorter north-south runway to the west (17R/35L). *See* pp. A1-A2, *infra*.

In 1952, what is now the major runway was extended to allow military aircraft access to the McDonnell Douglas Plant. Commercial air traffic was confined to the west runway. It was not until 1961 that a taxi-way was constructed to accommodate the newly extended runway. At that time, however, the vast majority of commercial aircraft continued to utilize the westernmost runway because of its proximity to the airport terminal and did not, therefore, adversely affect Oxley's property. Ultimately, a new terminal was constructed and, during the later 1960's, commercial jet aircraft began to use the eastern runway to the exclusion of the western runway.

With this increased use, Oxley's property became subjected to unbearable noise, noxious odors, extreme vibration, and overflights. In addition, American Airlines, which, after Oxley's purchase of the property, constructed a maintenance facility within one thousand feet of the property, conducted nightly tests, usually after midnight, wherein jet engines would be operated at full power for as long as two hours. These unbearable conditions adversely affected the Oxley family's use and enjoyment of the land and their thoroughbred horse breeding operation. Eventually, the property became unsuited for Oxley's intended use thereof. *See* pp. A1-A2, *infra*.

As the airport expanded, the city undertook a course of conduct which led Oxley to believe that, because of the airport conditions, his property would be acquired by the city. Assurances that the city would purchase the property were repeatedly made to Oxley and at public meetings of the Airport Authority. Although Oxley was told that two million dollars had been set aside for the purchase of his property, those funds were ultimately used for street con-

struction. Despite the abundance of funds held in the Federal Aviation Administration land acquisition trust fund, excuses were thereafter made that the purchase money was unavailable. As such, Oxley offered to finance the city's purchase of the property, but his offer was never accepted, the city failed to purchase or condemn the property, and the unbearable living conditions forced Oxley to move. *Id.*

During the same period of time, the city was required by the Federal Aviation Administration to prepare an Airport Noise Control and Land Use Compatibility Study (hereinafter referred to as ANCLUC). *See* pp. A23-A44, *infra*. That study repeatedly referred to the extreme conditions to which the Oxley property was subjected, consistently noted the property's suitability for airport development, unequivocally recommended acquisition of the property on a first priority basis, showed the property as being located inside the airport fence, described municipal development of the property in a manner identical to that ultimately proposed by Oxley, placed restrictions on, and prohibitions against, private commercial development of the land, and directed that the city purchase the property and thereafter seek reimbursement of the purchase price from federal funds. Two of ANCLUC's noise measurement testing sites (sites 1 and 15, *see* pp. A26-A29, A33, *infra*) were located on Oxley's property and established its location in a seventy-five Ldn zone, which required immediate acquisition based on the intolerable noise associated with such a classification. *See* p. A36 and pp. A38-A44, *infra*. ANCLUC mandated that acquisition of the Oxley property was the airport's highest land acquisition priority. Yet, no such acquisition, either by purchase or condemnation, was forthcoming.

The purpose of the ANCLUC study was to reduce the effects of airport generated noise and facilitate land use compatibility within the airport environs. It supplemented and confirmed the policies and recommendations of the Master Plan, adopted by the city in 1975. These documents are, to the extent possible, binding on the city and can be relied on by the public as expressions of land use policy. Both the Master Plan and ANCLUC recommended courses of airport expansion and development. ANCLUC established a schedule of priorities for the improvements and acquisitions necessary for both the expansion of the airport and making surrounding land use compatible with airport operations. Although ANCLUC is not concerned with zoning classifications, its policies and recommendations set forth the uses to which land was being put and established prospective uses to which it might be put in order to make it compatible with the noise generated by, and activities associated with, the airport. ANCLUC unequivocally states that certain uses within the seventy-five Ldn zone, in which Oxley's property is entirely located, are not compatible with the airport and the conditions it generates. Both ANCLUC and the Master Plan restricted certain, and absolutely forbade other, uses to which land surrounding the airport could be put. *Compare* p. A22, *infra* with pp. A34-A35, *infra*.

Oxley was unaware that the Master Plan and ANCLUC contained recommendations for acquisition of the property and, more importantly, prohibitions against certain types of private use and development. In addition, those documents contained recommendations for municipal development of the property which mirrored Oxley's plans and proposals contained in his 1981 application for a special exception under the City Ordinances to develop his property as an airport. *See* pp. A3-A5, *infra*.

The application was denied and Oxley was forced to rezone the property for airport related light industrial use. As part of his development plan, Oxley sought permission from the city to conduct a "through the fence" operation wherein his property would be permitted access to the airport through the construction of ramps and taxiways which would allow aircraft to utilize airport related businesses to be located on the Oxley property. *See* p. A4, *infra*. Oxley would use the property to operate aircraft sales, hangaring, and servicing facilities, and to conduct fixed base operations and their concomitant aircraft related office, freight, and cargo facilities. Restaurants, motels, and other rental businesses that are necessary for a complete service facility were also proposed in Oxley's plan. In order to accomplish this goal, a limited joint venture was established between Oxley and Douglas Jandebeur, an airport fixed base operator, under which Oxley would provide the financing for the project and Jandebeur would provide the expertise for the daily operation of the facility.

When Oxley sought to pursue those development plans, although the city outwardly expressed a conditional willingness to permit such operations, both the Master Plan and ANCLUC, as planning documents, would have prohibited such development. *See* pp. A22, A34-A35, *infra*. In the Master Plan, the city stated that, upon acquiring Oxley's property, it would put that property to uses virtually identical to those proposed by Oxley when he requested permission to operate a "through the fence" facility. The Master Plan stated that the Oxley property was to be developed by the airport as a general aviation apron, hangar expansion, and for aviation related industry. It is also noted that fixed base operators might be located on the property. ANCLUC also recommended that, upon acquisition from Oxley, the city conduct enterprises virtually identical to those proposed by Oxley. The intent to ac-

quire Oxley's property as expressed in both the Master Plan and ANCLUC, was publicly confirmed in June, 1982. *See* p. A3, *infra.* In addition, on July 14, 1983, the Airports Improvement Trust directed that all sixty-four acres of residential property within the seventy-five Ldn contour should be acquired. The Oxley property comprised virtually all of that contour. *See* pp. A37-A38, *infra.* Thus, the city's intent to acquire the property destroyed the investment and development potential of the land and the joint venture between Jandebeur and Oxley was terminated.

Although the airport had provided "through the fence" access to other private individuals, Oxley's request for such access met with opposition despite the general policy of the Federal Aviation Administration that such access, once granted to one person, could not be discriminatorily withheld from another. The city's opposition took the form of the imposition of unreasonable conditions that would have resulted in the Oxley property being assessed with charges and "user fees" equal to those being assessed against "on-airport" business which leased their facilities from the city. In some instances, these charges had been as high as eighty-five percent (85%) of the gross profits of the affected enterprise. The conditions had not been imposed on other entities that had previously been granted through the fence access. The imposition of such unreasonable conditions effectively denied "through the fence" access. The irony of imposing such conditions is that both the Master Plan and ANCLUC would have precluded commercial development of the property even if such access could have been made reasonably available. Moreover, residential use of the property was impossible because of airport conditions. In short, all use of the property was effectively prevented.

After the city's public declaration that it intended to acquire the entire tract of land between the two runways, which included the Oxley property, Oxley was faced with the city's apparent refusal to purchase the property, its steadfast unwillingness to grant reasonable access to the field, and both the restrictions and the outright prohibitions of the Master Plan and ANCLUC.

The city has never explained this obvious inconsistency between its conduct and the policies to which it was bound and which have been adopted almost in their entirety. The city's failure to purchase or condemn the Oxley property is the one glaring exception to full implementation of those policies. As such, the city violated its statutory duties and Oxley was forced to institute this action in inverse condemnation on February 13, 1984.

REASONS FOR GRANTING THE WRIT

I

THE JUDGMENT BELOW THAT NO TAKING OCCURRED CONSTITUTES A DECISION OF FEDERAL LAW THAT IS BOTH IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT AND AN IMPORTANT DECISION REGARDING FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

The Oklahoma Supreme Court's decision is partly the function of that court's misperception of the procedure by which the trial was conducted. The Oklahoma Court's decision was based on the notion that the trial was bifurcated. In fact, the trial was trifurcated. To effectuate the trifurcation, the trial court ruled that Oxley's phase one case in chief could not include presentation of evidence of anti-competitive conduct. Only airport conditions were

relevant to the interference. When the city, however, introduced evidence of other potential uses to which the property might be put, the court permitted Oxley to rebut those contentions by establishing that the city's planning documents and its anti-competitive conduct had, in fact, precluded those other potential uses.

The Oklahoma Supreme Court, improperly relying on bifurcation, ignoring the dissolution of the in limine order, and failing to discuss or cite this Court's decisions, held:

> Because of the trial court's ruling in limine, the appellant's assertions that the airport imposed unreasonable restrictions on through - the - fence operations and engaged in other "discriminatory" and "anti-competitive" practices, are all without factual support in this record. But even assuming, arguendo, that the record disclosed facts in support of the appellant's allegations of discrimination and anti-competitive practices, there would still be insufficient showing under [*State ex rel., Dept. of Highways v. Cook,* 542 P.2d 1405 (Okla. 1975)] to form the basis of a finding that a de facto taking had occurred.
>
> . . . Here there is no "taking" of access, but rather a refusal to grant access.
>
> . . . Refusal to grant access does not, however, constitute an "overt" act leading to the exercise of dominion and control.

Oxley v. City of Tulsa, see p. A1, *infra.*

If judicial focus is restricted to the only issue properly presented in the first phase of the trial, that is, substantial interference with any recognized and protected property interest, then the question presented for review is whether airport conditions constituted a substantial, *Henthorn v. Oklahoma City,* 453 P.2d 1013, 1016 (Okla. 1969), or im-

mediate interference, *United States v. Causby*, 328 U.S. 256, 266 (1946), with a protected property interest that was "sufficiently direct, sufficiently peculiar, and of sufficient magnitude to cause [the court] to conclude that fairness and justice, as between the State and the citizen, requires the burden imposed to be borne by the public and not by the individual alone." *Batten v. United States*, 306 F.2d 580, 587 (10th Cir. 1962) (Murrah, J., dissenting). If so, then a compensable taking had occurred.

If, however, because of the city's violation of the in limine order granted at its behest, judicial inquiry is compelled to account for the city's anti-competitive conduct in determining the existence of a substantial interference, then the sufficiency and immediacy of the interference must be determined by also considering evidence of anti-competitive conduct and the restrictions and prohibitions contained in land use planning documents.

It is well established that noise and overflights can become so burdensome to the land they affect that their presence results in a taking thereof. In *United States v. Causby*, 328 U.S. 256 (1946), the issue was whether the respondents' property was taken, within the meaning of the Fifth Amendment, by frequent and regular low altitude flights over their land. *Id.* at 258. This Court recognized that noise and overflights could result in a taking of property and stated that the effect of these conditions "was the destruction of the property as a commercial chicken farm. Residents are frequently deprived of their sleep and the family has become nervous and frightened." *Id.* at 259. The Court held that flights over private land amount to a taking if they are "so low and so frequent as to be a direct and immediate interference with the enjoyment and the use of the land." *Id.* at 266.

Sixteen (16) years later, in *Griggs v. Allegheny County*, 369 U.S. 85 (1962), it was held that a landowner was entitled to compensation because the noise produced by aircraft was comparable to that produced by a jack hammer or noisy factory. The Court stated:

> "Regular and almost continuous daily flights, often several minutes apart, have been made by a number of airlines directly over and very, very close to plaintiff's residence. During these flights it was often impossible for people in the house to converse or to talk on the telephone. The plaintiff and the members of his household . . . were frequently unable to sleep even with earplugs and sleeping pills; they would frequently be awakened by the flight and the noise of the planes; windows of their home would frequently rattle and at times plaster fell down from walls and ceilings; their health was affected and impaired, and they sometimes were compelled to sleep elsewhere."

Id. at 87.

In *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987), the plaintiff alleged that the ordinance at issue denied all use of the land. The issue was "whether the Just Compensation Clause requires the government to pay for 'temporary' regulatory takings." *Id.* at 313. In *Lutheran Church*, it was stated:

> "It would ve a very curious and unsatisfactory result if . . . it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of the word, it is not *taken* for public use."

Id. at 316-17 (emphasis in original). The Court noted the general rule that "while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking. . . . [T]he entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without . . . formal proceedings." *Id.* at 316.

The Court has recognized that the line between a permissible regulation and a taking requiring compensation is not always easily determined. In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), guidance was given as to where that line must be drawn when it was stated:

> [L]and use regulation does not effect a taking if it "substantially advance[s] legitimate state interests" and does not "den[y] an owner economically viable use of his land." . . . Our cases have not elaborated on the standards for determining what constitutes a "legitimate state interest" or what type of connection between the regulation and the state interest satisfies the requirement that the former "substantially advance" the latter. They have made clear, however, that a broad range of governmental purposes and regulations satisfy these requirements.

Id. at 834-35 (footnotes omitted). Obviously, an utter failure to advance the legitimate state interest is constitutionally forbidden. In addition, the lack of connection between a condition imposed on the use of land and the purpose to be achieved means:

> The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of just compensation. Whatever may be the outer limits of "legitimate state interests" in the takings and land-use context, this is

> not one of them. In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but "an out-and-out plan of extortion."

Id. at 837. The Court continued:

> We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination. As indicated earlier, our cases describe the condition for abridgement of property rights through the police power as a "*substantial* advanc[ing]" of a legitimate state interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is a heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective.

Id. at 841.

Although *Lutheran Church* and *Nollan* apply to the issues herein, neither of those opinions considered the question of whether the governmental regulations and conduct had permanently denied to those landowners all reasonable and economically viable use of their property. *Agins v. City of Tiburon*, 447 U.S. 255 (1980), however, did address that issue. In *Agins*, the plaintiffs brought an inverse condemnation action seeking a declaration that various zoning ordinances were facially unconstitutional. Although the Court rejected the claim and found that the ordinances substantially advanced legitimate state interests, dicta in the court's opinion is directly applicable to the facts of the present litigation. The Court stated:

> Although the ordinances limit development, they neither prevent the best use of the appellants' land . . . nor extinguish a fundamental attribute of ownership. . . . At this juncture, the appellants are free to pursue their reasonable investment expectations by submitting a development plan to local officials. Thus, it cannot be said that the impact of general land-use regulations has denied appellants the "justice and fairness" guaranteed by the Fifth and Fourteenth Amendments.

Id. at 262-63.

Although it predated *Agins*, *Lutheran Church*, and *Nollan*, Judge Murrah's dissent in *Batten v. United States*, 306 F.2d 580 (10th Cir. 1962), served as the basis for the trial court's jury instructions in the instant action. Judge Murrah called for a balancing between the state and private interests and formulated the following constitutional test:

> Whether the asserted interest is one which the law will protect; if so, whether the interference is sufficiently direct, sufficiently peculiar, and of sufficient magnitude to cause us to conclude that fairness and justice, as between the State and the citizen, requires the burden imposed to be borne by the public and not by the individual alone.

Id. at 587.

In *Thornburg v. Port of Portland*, 376 P.2d 100 (Or. 1962), the Oregon Supreme Court, in an inverse condemnation action, stated that "there is a question, in each case, as a matter of fact, whether or not the governmental activity complained of has resulted in so substantial an interference with use and enjoyment of one's land as to amount to a taking of private property for public use." *Id.* at 105. Based

on this standard, the court stated, in language consistent with this Court's *Nollan* opinion:

> [A] taking occurs whenever government acts in such a way as substantially to deprive an owner of the useful possession of that which he owns, either by repeated trespasses or by repeated nontrespassory invasions call "nuisance". If reparations are to be denied, they should be denied for reasons of policy which are themselves strong enough to counter-balance the constitutional demand that reparations be paid.

Id. at 107.

Causby's "immediate interference" requirement and the substantial interference test contained in Judge Murrah's dissent and the *Thornburg* opinion have been adopted by the Supreme Court of Oklahoma in *Henthorn v. Oklahoma City*, 453 P.2d 1013 (Okla. 1969). In *Henthorn*, the court stated that "there must be a substantial interference with the use and enjoyment of the property affected, in addition to showing low, continuous, frequent flights over or in close proximity to the plaintiff's property." *Id.* at 1016.

Despite the trial court's ruling in limine and because of the city's interjection of evidence and issues not otherwise properly presented in phase one, the combined effects of airport conditions and anti-competitive conduct were properly before the jury for its decision as to whether there had been a substantial interference with a protected property interest. If the evidence established such an interference, then the threshold test of "immediate interference" mandated by *Causby* and *Griggs* have been met because the unbearable living conditions generated by airport operations appropriated an avigation easement by virtue of their immediate interference with a protected property in-

terest. Further, under the analysis required by *Agins*, *Lutheran Church*, and *Nollan*, the anti-competitive regulation of the property, which, whether termed a "refusal to grant access" or a "denial of access," was a violation of FAA policy regulations and effectively precluded all use of the property - residential, commercial, and airport related light industrial. Such regulation, whether codified, incorporated into binding and implemented planning documents, or individually imposed to insulate government from the competition of private enterprise, "goes too far" and must "be recognized as a taking," *Lutheran Church* at 316, because it does not "substantially advance legitimate state interests" and denies Oxley the "economically viable use of his land." *Nollan* at 834.

A writ of certiorari should, therefore, issue to resolve this important question of law and policy.

II

BECAUSE THE TRIAL COURT'S IN LIMINE RULING WAS DISSOLVED TO ALLOW PROOF OF ANTI-COMPETITIVE CONDUCT, THAT PROOF, COMBINED WITH THE CITY'S UNEQUIVOCAL INTENT TO ACQUIRE OXLEY'S PROPERTY, ESTABLISHED AN IMMEDIATE INTERFERENCE WITH A PROTECTED PROPERTY INTEREST.

The Oklahoma Supreme Court's decision denying Fifth Amendment compensation to the petitioner is in conflict with decisions rendered by the California, Minnesota, Oregon, and Pennsylvania courts. In those jurisdictions, it has been held that unequivocal and overt action, undertaken pursuant to an expressed intent to acquire private land which is to be thereafter used in connection with the public improvement, constitutes a taking.

In the present litigation, the Master Plan and ANCLUC are the equivalent of zoning ordinances because they contain recommendations that can be relied upon by landowners as statements of municipal policy. In addition, with the exception of specific recommendations concerning Oxley's property, the policies and recommendations have been uniformly followed in the expansion of the airport. Many of the policies and recommendations preclude uses to which the Oxley property can be put.

In *In re Philadelphia Parkway*, 250 Pa. 257, 95 A. 429 (1915), the Pennsylvania Supreme Court was called upon to determine whether land, lying directly in the path of a proposed parkway, had been effectively taken from its owner. The evidence established that after the parkway was platted, the city acquired property within the proposed right of way. At the time of trial, some work had been completed on the parkway. In holding that the landowner was entitled to compensation, the court noted that the parkway was a worthless improvement unless it was finished in its entirety. *Id.* at ____, 95 A. at 430-31. In holding in favor of the landowner, the court stated:

> [I]f the City did some unequivocal act evidencing an intention to open, followed by actual work done on the projected street, the right to compensation under proper circumstances might accrue even if counsels had failed or neglected to pass an opening ordinance. . . . Here we have not one but a series of unequivocal acts covering a period of years and all evidencing the intention of the City to open and complete the parkway. In furtherance of the intention to open and complete the undertaking, lands have been condemned under the power of eminent domain, properties purchased, improvements made, and large sums of money expended. The City is just as irrevocably committed

> to the improvement as if the ordinance to open had been passed.

Id. at ____, 95 A. at 431. Philadelphia Parkway establishes that a condemning authority cannot resist a request for the payment of compensation in an inverse condemnation action by hiding behind an argument "that there has been no actual, physical taking" of a landowner's property. *Carson Street Case,* 101 Pitt. L.J. 35, 38 (1952). The rule that mere platting of property does not constitute a "taking" is, therefore, subject to an important exception relating to a condemning authority's demonstrated intent to take property for a public purpose and its commission of one or more unequivocal acts establishing that intent.

In *Hilltop Properties, Inc. v. State,* 43 Cal. Rptr. 605 (1965), the plaintiff alleged that pursuant to the defendant's request, it reserved two strips of its property for highway use and that the defendant's intent to take, and its unequivocal acts in conformity therewith, had deprived the plaintiff of the use of its property. Although the court held that the enumerated circumstances were not exceptional and did not, therefore, justify an award of compensation to the landowners, it stated:

> [W]here a City does some unequivocal act evidencing an intention to open a proposed street, parkway, or other contemplated improvement, or where the prohibitory provisions of an ordinance or statute are such as actually to interfere with an owner's use of his property, it is held the acts amount to a taking in the constitutional sense.

Id. at 609. In justifying its holding, the court distinguished the *Philadelphia Parkway* case by stating:

> There the situation which developed was that at intervals during a period of from ten to twelve years certain properties in the area of the proposed parkway had been acquired by the city either by condemnation or by purchase; some buildings had been torn down, and some improvements made and work done on parts of the parkway. In holding that property owners were entitled to relief in damages because of the situation in which they had been placed, through no fault or act of their own, while waiting for the city to do something to relieve them from the hardships of the situation, the reviewing court allowed such relief on the basis that the facts warranted an exception to the general rule. The rationale of the holding is that the city's unequivocal acts evidencing and intent to open the parkway followed by actual work done on the projected street, constituted such exceptional circumstances as to entitle the property owners to compensation.

Id. at 610. Thus, if a landowner shows the existence of exceptional circumstances "which have substantially deprived him of the use and enjoyment of his property," he is entitled to compensation. *Commonwealth v. Lawton*, 50 Pa. C. 144, ____, 412 A.2d 214, 216 (1980).

The focus of the inquiry in determining whether there has been an immediate interference with Oxley's property is a showing that a formal condemnation of his land was inevitable. *Id.* Oxley is entitled to compensation for his loss because by reason of the actions of the city "(1) he is precluded from all economically feasible private uses pending eventual taking for public use; or (2) the designation results in such governmental intrusion as to inflict virtually irreversible damage." *Fifth Avenue Corp. v. Washington County*, 282 Or. 591, ____, 581 P.2d 50, 63

(1978). Thus, when there is a demonstrated intent to acquire private property for a public purpose and the condemning authority establishes that intent by some unequivocal act, such as the commencement of work on the proposed public project, then there are special circumstances which justify an award of compensation. *E.g., Concrete Services Co. v. State*, 274 Cal. App. 2d 142, 78 Cal. Rptr. 923 (1969). Under such circumstances, the condemning authority is found to have acquired the real property "not as a result of bargaining in the open market, but rather in the broad exercise of its power to condemn private property for public use." *Id.* at 926.

This Court's decisions in *Causby, Griggs, Agins, Lutheran Church,* and *Nollan* serve as the foundation for a holding that a combination between (1) conduct which either unduly restricts or entirely prohibits the reasonable use and development of land and (2) conditions associated with the operation of an airport which make residential use impossible, results in a compensable taking under the Fifth Amendment. The city's intent to acquire Oxley's property was clearly established. The implementation of the Master Plan and ANCLUC policy recommendations and the irrevocable commitment to the expansion of the airport are the unequivocal and overt acts which have caused an immediate and substantial interference with protected property rights which, in turn, lead to the effective exercise of dominion and control over the land which precludes all reasonable use thereof. Such an immediate interference which does not substantially advance legitimate state interests is a compensable taking.

To find an immediate and direct interference in this litigation is the logical extension of this Court's prior holdings and is consistent with eminent domain principles announced by other jurisdictions. The concurrence of air-

port conditions, policies set forth in binding planning documents which prohibited or otherwise restricted reasonable use and economically viable development of the land, and anti-competitive conduct which placed unreasonable restrictions on good faith proposals for development, eliminates any possibility that Oxley can ever use, enjoy, develop, or dispose of his property. The elimination of those protected interests confirms the substantial nature of the interference.

The city has never explained its failure either to purchase on reasonable terms or to condemn the Oxley property. It has never explained the contradictions between its outward expressions of a purported willingness to permit development, albeit on unreasonable conditions, and the restrictions and prohibitions of the Master Plan and ANCLUC. It has never explained its reasons for imposing such onerous conditions on through the fence access. It has never explained its reasons for failing to comply with FAA policies by imposing discriminatory conditions on such access. It has never explained its reasons for pursuing and complying with every other Master Plan and ANCLUC policy except the mandate that the Oxley property be acquired on a first priority basis. It has never explained why the Oxley property was carved out of acquisition tract B, while the remaining properties contained therein were either purchased or condemned.

In an action seeking a declaratory judgment that zoning ordinances improperly restricted the uses to which land could be put, the California Court of Appeals, in *Kissinger v. City of Los Angeles*, 161 Cal. App. 2d 454, 327 P.2d 10 (1958), stated that land use regulation which is clearly unreasonable, oppressive, or discriminatory, is impermissible. The court noted that the city's conduct was a blatant attempt to use its police power to take property without paying just compensation. The court stated:

> The evidence establishes that to accomplish the enlargement of the airport and the creation of the approach zone . . . the city intends to condemn the subject property. The inference is clear that the true purpose of the ordinance was to prevent the improvement of the subject property in order that it might be acquired at a lesser price for airport purposes.

Id. at ____, 327 P.2d at 16. The court did not accept Los Angeles' attempt to justify its conduct. Unlike Los Angeles, the city of Tulsa has never attempted to justify its conduct.

The unspoken reasons for the city's conduct are clear. Compliance with the Master Plan and ANCLUC means that the city intends to develop the Oxley property for purposes identical to those proposed by Oxley. Oxley's proposed development would not only preclude similar municipal development on the site, it would also present immediate and effective competition with what is now a municipal monopoly. Thus, rather than comply with ANCLUC and meet its statutorily imposed obligations to avoid the commencement of inverse condemnation actions, the city is in the enviable position of destroying the value of the land without being held responsible for its conduct. Oxley's land is left alone to bear the burdens of the airport; burdens that should be borne by the public as a whole. The city is insulated from its conduct and is left alone to enjoy its monopoly. The city's policies and conduct have not resulted in the arbitration of competing land uses. Rather, they consist of "regulation for the sole benefit of a governmental enterprise." *McShane v. Farribault*, 292 N.W.2d 253, 257 (Minn. 1980). Under the foregoing circumstances, and as was noted in this Court's *Nollan* opinion, landowners and developers are left to guess at the nature and quality of the "substantial state interests" that

can justify an uncompensated taking of one, more, or all of the protected interests in property.

By precluding development of the property, destroying its residential use, and by imposing restrictions and prohibitions that make development and use impossible, the city fosters its monopoly. Although the failure to comply with the mandate to acquire the property prevents municipal development of the land, the profitability of the city's enterprise remains unaffected because of its monopoly status. Under *Nollan*, therefore, the legitimacy of the city's monopoly, the propriety of imposing unreasonable conditions on access to the field, and the failure to implement Master Plan, ANCLUC, and statutory policies are all brought into question because the city's conduct does not advance legitimate state interests and has the cumulative effect of depriving Oxley of all economically viable use of his land. As it was stated by this Court in *Lutheran Church*, that is "a very curious and unsatisfactory result." Yet, such is the effect of the Oklahoma Supreme Court's decision.

This Court's *Causby, Griggs, Agins, Lutheran Church*, and *Nollan* decisions constitute a line of authority under the Fifth and Fourteenth Amendments which is binding on the Oklahoma courts. Those decisions are the foundation for a holding that a municipality's land use planning documents and intentional misconduct which, when both combined with the normal consequences of operating an airport, precludes all reasonable use of property, effectuates a compensable taking of property. This Court's decisions are consistent with the state court decisions in *Thornburgh, Kissinger, Fifth Avenue,* and *Philadelphia Parkway.* Those decisions are diametrically opposed to the decision of the Oklahoma Supreme Court which expresses the policy, and establishes an unfortunate prece-

dent that a municipality (1) has unfettered discretion to operate its airport in a way that substantially intrudes upon the rights of surrounding landowners, (2) can, in essence, destroy the value of property by preventing its reasonable use in the vicinity of an airport, and (3) has no accountability, as a matter of either governmental policy or economics, for its actions. Such extreme deference to a municipality's power has resulted in an utter disregard for the landowner's rights to use, dispose of, enjoy, and/or develop his property. In fact, the decision sanctions a municipality's total divestiture of every right of use and expectancy that would otherwise be available to a landowner. *See Kaiser Aetna v. United States,* 444 U.S. 164, 179-80 (1979).

The opinion of the Oklahoma Supreme Court has either improperly decided, or failed to address properly, a very specific constitutional issue as to the extent of regulation of use that is permissible when certain other uses are impossible by virtue of conditions that cannot be changed, and which, in combination, either preclude all reasonable use of the property or substantially interfere with one or more protected interests therein. Tulsa International Airport continues to grow, with construction of a third North-South runway currently in process, thereby increasing the amount of property, and number of individuals, affected by airport conditions. McDonnell Douglas and American Airlines continue to expand their respective construction and maintenance facilities, thereby further increasing air traffic at the airport. When larger and noisier aircraft begin to use the airport at increased numbers, what is to happen to other landowners whose homes happen to bear a disproportionally significant brunt of progress and expansion? Their rights to use, enjoy, develop, and dispose of their properties will be affected to as great an, if not a greater, extent as Oxley's property is now affected. With-

out a grant of the writ requested herein and ultimate reversal of the Oklahoma Supreme Court's decision, the City of Tulsa, and other governmental entities, will surely feel secure in their ability to destroy property values, subjugate land to the burdens of an airport, preclude all reasonable use and development of land near an airport, and either acquire the properties at a depressed value or preclude enterprising individuals from making the best out of an intolerable and unfair situation. At the very least, the conflict among the decisions and Oklahoma's divergence from this Court's precedents, results in an unsettled federal framework around which future decisions must be formulated. Unfortunately, the Oklahoma Supreme Court's opinion, which neither provides sufficient detail of the facts elicited at trial nor properly accounts for the procedural context in which the action was tried, is sufficiently broad to uphold similarly egregious municipal conduct in other jurisdictions. That conduct, being violative of the Fifth and Fourteenth Amendments must be recognized for what it is: a compensable taking.

III

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Petition for Certiorari be granted. If it is later determined on the merits that Oxley is correct in urging that there has been an immediate and substantial interference with a protected property interest, then the matter should be remanded to the state courts for a determination of the extent of the taking and the compensation to be paid to the petitioner.

Respectfully submitted,

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December 19, 1989

APPENDIX

(March 28, 1989)

OPINION FROM THE OKLAHOMA SUPREME COURT

JOHN T. OXLEY, Appellant, v. CITY OF TULSA, OKLAHOMA, a municipal corporation, by and through THE TULSA AIRPORT AUTHORITY, Appellees.

No. 67,016. March 28, 1989.

Appeal from District Court, Tulsa County, Hon. Robert Scott, District Judge.

Appeal by landowner from jury verdict in inverse condemnation case. City of Tulsa cross-appeals trial courts denial of motion to assess commissioner's costs, and cost of defending action against land owner.

JUDGMENT ON VERDICT FOR DEFENDANT, CITY OF TULSA, AFFIRMED. CROSS-APPEAL BY CITY OF TULSA DISMISSED.

Bruce A. McKenna, N. Franklyn Casey, Tulsa, for appellant.

J. Richard Studenny, Randall S. Pickard, Tulsa, for appellee.

SIMMS J.: Action below for inverse condemnation. Appellant, Oxley, is the owner of approximately sixty (60) acres of land adjacent to, and partially surrounded by, the Tulsa International Airport. The chronology of events and facts are largely undisputed.

Appellant purchased the property at issue in 1951. At the time, the airport was much smaller, and used only by propeller driven aircraft. Appellant built his family home on the premises and began a horse breeding operation, all without disturbance by the airplanes using the facility.

A year later, the east runway to the airport was extended parallel to the appellant's property on the east side. Years later, in 1961, a taxiway was added to the west side of that runway to improve airport access for commercial jets. At this point in time, the appellant's property directly adjoined the taxiway. Eventually, in 1972 or 1973, because of the increasing volume of flights using the east runway and the associated noise, the appellant moved his home and horse ranching operation to other land he owned in the county. He continued, however, to use the buildings and land as rental property. Appellant testified that he had trouble keeping tenants during this time, however, because of the extreme noise associated with airport operations.

In 1975, the Trustees of the Tulsa Airport Improvement Trust adopted a master plan for airport expansion. As part of the overall scheme for future growth, the plan prohibited further development of the surrounding land for those uses described as incompatible with the airport. The primary incompatible use was residential. Because of its continued residential use, the plaintiff's land was considered a top priority for airport acquisition in the master plan. The appellant testified that an appraisal was ordered by the Airport Authority at that time, but no offer to purchase followed. He also testified that at various times during these years he had attempted to negotiate with the Airport Authority for the purchase of his property and that at one time, he offered to agree to some type of time payment plan.

In 1980-81, a noise compatibility study was conducted as an update of the master plan, designated the "ANCLUC" study.[1] ANCLUC, too, identified the appel-

1. "ANCLUC" is the acronym used to designate The Airport Noise Compatibility and Land Use Study. The airport director testified that this study is an additional planning document required by the Federal Aeronotics Administration as an update to the master plan in order to qualify for certain types of federal funds.

lant's property as a priority for airport acquisition because of extreme noise impact on the property and because of its incompatible, residential, use.[2] According to the ANCLUC study, the appellants property was in the area of highest noise impact.

Acquisition of the appellant's property was authorized at a meeting of the Airport Trustees held in June, 1982. This authorization was based on a preliminary draft of the ANCLUC study. The minutes of the meeting show that the trustees planned to fund the purchase of the property with money owed the airport by the city of Tulsa. These minutes also show that it was the trustees' belief at the time that later development of the property would reimburse the airport for the funds used to purchase the land. Appraisers were again sent to establish a value for the property. In September of that year, the property owners in the impact area were notified that the Airport was considering acquisition of the property and were given information about landowner's condemnation rights. That notification advised them not to relocate or contract with third parties for the sale of his property since that would risk "losing your eligibility for relocation assistance." The owners were also asked to cooperate with the Airport Authority by providing abstracts of title, which the Airport would have updated.

The record shows that three months after receipt of the aforementioned letter, the appellant filed an application with the city to change the zoning for his property to light

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2. An examination of ANCLUC shows that the parcel in question is the first acquisition priority and is discussed solely in terms of acquisition. ANCLUC does state that afterwards, the property could be developed for airport compatible uses and that development could be used to defray the costs of its purchase. The study recommended that "every effort should be made to purchase properties on an opportunity basis, rather than resorting to condemnation."

industrial and commercial. A hearing on this application was held on January 6, 1983. That same day, the airport offered to purchase the property for $1,500,000.00. This offer was rejected within a few days in a letter from the appellant's attorney with the comment that the property "was not for sale."

The next communication was in a letter dated March 22, 1983, from the appellant's attorney addressed to the airport director. In this letter, the director is reminded that the appellant is appealing the denial of his application for a special zoning exception to the district court and asks the director for information on the terms the airport would impose for an agreement to access airport facilities so the appellant could develop his property for airport-related businesses. The airport director responded with a general outline of "through-the-fence"[3] requirements by letter dated June 1, 1983. There was, apparently, no further written communication between the appellant and airport authorities on this request, nor do the minutes of the Trustees' meeting, held the following month, show that the trustees were advised about the appellant's inquiry. Those minutes do, however, show that the trustees gave final approval and adoption to the ANCLUC noise control study and approved a change in the private property acquisition policy. Under this change, land would no longer be acquired by large blocks, but rather as individual parcels within the discretion of the airport staff. A prioritization

3. "through-the-fence" is a term of art used in airport operations to denote a plan whereby a private landowner is allowed access to publicly owned airport property, subject to certain conditions adapted from FAA recommendations, in order to conduct a private business in airport-related enterprises. Without a "through-the-fence" agreement, persons desiring to conduct these businesses must lease facilities from the airport itself. According to trial testimony, income from such lease agreements provides a significant portion of an airport's operating income.

plan was still established. As residential land, the appellant's property continued to have the highest priority.

The appellant was successful in his rezoning efforts and his property was rezoned for commercial and light industrial uses in December, 1983. Feeling that he was unable to competitively develop his property because of the airport's requirements for "through-the-fence" operations and its alleged stated intention to "take" the property, the appellant filed this inverse condemnation on February 14, 1984.

Commissioners were appointed and returned an appraisal of $1,250,000.00 in damages. The City of Tulsa filed exceptions to the report; plaintiff/appellant's demand for a jury trial was granted.

At trial, the appellant sought to show a fee simple de facto taking of his property, allegedly accomplished by the airport in two stages. The first stage was the alleged de facto taking of the residential use and enjoyment of the property by excessive noise, fumes and odors. The Airport does not contest the fact that the fumes, noise and odors caused a substantial impairment to the residential use of the property.

The second stage, as alleged by the appellant, was a taking by the airport of all other uses by oppressive and anti-competitive conduct, resulting in the appellant being unable to develop his land for its highest and best use: airport related light industrial and commercial uses.

By pretrial order, the court divided the trial into two phases. The first phase was on the issue of whether there had been a de facto taking. The second phase was to be on the issue of the extent of the taking and damages therefor. At the same time, the court sustained the city's motion in limine to exclude all mention of alleged anti-

competitive acts by the airport and to limit introduction of the ANCLUC study only as it related to noise, overflights and odors. The court ruled that the excluded evidence would only be relevant to the issue of damages. At the close of the first phase, the jury returned a verdict for defendant city. Oxley's motions for new trial and judgment notwithstanding the verdict were subsequently overruled by the trial court and this appeal followed. Later, as prevailing party, the city presented motions to the court requesting that Oxley be assessed the costs of the commissioners appointed to assess damages and seeking to recover the costs of defending the action. The court denied these motions and the city cross-appeals.

I.

As appellant Oxley's first proposition of error, he argues that the trial court erred when it refused to grant his motion for judgment on the opening statements and further erred in refusing to grant his motions for directed verdict and judgment notwithstanding the verdict. We cannot agree.

Oxley's petition alleged a fee simple "taking" of his property. At best, the city only admitted that the airport operations surrounding the appellant's property made that land unsuitable for residential use. A dispute remained as to whether the airport's operations effected a de facto taking of all other uses. Resolution of this dispute required a factual determination of whether the interference of the appellant's use by noise, odors and fumes associated with airport operations was of such a substantial nature as to take the appellant's property in fee.

This is a jury question and it would have been error to sustain Oxley's motions for judgment on the opening statements and for directed verdict. *Matoon v. City of*

Norman, Okl., 617 P.2d 1347, (1980). The test is "whether there is a sufficient interference with the landowner's use and enjoyment to constitute a taking. [This question] is one that the trier of facts must decide." *Matoon*, supra, at 1349. *Henthorn v. City of Oklahoma City*, Okl., 453 P.2d 1013, (1969).[4]

As a portion of his third proposition of error, the appellant raises the same issue as in his first proposition when he states that the trial court erred in allowing the jury to determine a matter of law, whether noise, overflights and odors effected a taking of his property. This proposition misstates the jury function in an inverse condemnation action. After review of the transcript of the hearing on the appellant's motions, discussed above, it is clear that the trial court was not charging the jury with the task of resolving the legal question of a "taking", but rather with the task of making the factual findings which must necessarily precede the legal conclusion urged by appellant. *Henthorn*, supra, at 1016.

II.

In support of his arguments that the trial court should find a de facto taking as a matter of law, Oxley argued that an intent by a municipality to acquire property, coupled

4. It is important to note at this point that the appellants burden was to prove significant impairment of the fee estate in his property, rather than impairment of a single use, i.e.: residential. In recognizing this point, we note that the appellant, voluntarily and with full knowledge regarding the airport's intentions and the reasons for those intentions, elected to have his property rezoned to a compatible use. Oklahoma and other jurisdictions have recognized the doctrine of "estoppel by acquiescence". See e.g.: *Oklahoma City v. Wells*, supra; *Becker v. Rolle*, 508 P.2d 509 (Kan. 1973); *Scott v. Jordan*, 661 P.2d 59 (N.M.App.1983). "Acquiescence arises where a person who knows he is entitled to impeach a transaction but neglects to do so for such length of time that, under the circumstances of the case, the other party may fairly infer that he has abandoned his right." Becker, supra, at 514, citing: *Black's Law Dictionary*, 4th Ed. at 40 (emphasis supplied).

with some unequivocal act in furtherance of that intent, is tantamount to an overt act by the municipality to assert dominion and control. This is also the argument for appellant's second assignment of error on appeal.

The record shows that the city, through the Airport Authority, has expressed its intent and plan to acquire the appellant's land. The appellant's land is often referred to in the ANCLUC study as a priority for acquisition. There can be no doubt that the airport was attempting to implement the plan when it offered to purchase the appellant's property. In *State, ex.rel., Department of Highways v. Cook* 542 P.2d 1405 (1975), another inverse condemnation action, a landowner had alleged that the state had engaged in a number of activities which served to inhibit private development of the appellant's land as a precursor to later acquisition. Among these, *inter alia*, were the state's published plans for future development of the landowners property; the state's refusal to act on applications for development presented by private developers; and the city's denial of an application to change the zoning for the landowner's property in order to accommodate the state's future development plans. When presented with facts showing those, and other, acts by the state in furtherance of a master plan for land acquisition, this Court said in *Cook*, that "there is neither an actual taking nor has there been demonstrated any overt act leading to exercise of dominion and control over [the] property upon which to base a finding of de facto taking." *Cook*, supra, at 1407.

Similarly, in this case, the appellant has only shown that the Airport Authority planned to acquire his property, as demonstrated by the offer to purchase and ANCLUC. Also, the appellant has shown that one developer chose not to proceed with negotiations to purchase the land in question; that decision was based, in part, on

the Airport Authority's stated intentions. Because of the trial court's ruling in limine, the appellant's assertions that the airport imposed unreasonable restrictions on through-the-fence operations and engaged in other "discriminatory" and "anti-competitive" practices, are all without factual support in this record. But even assuming, arguendo, that the record disclosed facts in support of the appellant's allegations of discrimination and anti-competitive practices, there would still be insufficient showing under *Cook*, supra, to form the basis of a finding that a de facto taking had occurred.

The appellant's allegations of anti-competitive practices are based on the Airport Authority's alleged refusal to allow him low cost access to the runway in order to increase the profitability of private enterprises conducted on his own land. Even if true, the essence of the appellant's argument is that unless an adjacent landowner, in this case a public entity, grants him low cost access to public land, a taking has been effected because the appellant cannot conduct as profitable a business enterprise without the access. Here, there is no "taking" of access, but rather a refusal to grant access.

As in the case of land adjacent to a major highway, access, or the lack thereof, becomes an element of value to be taken into account once a "taking" has been shown. *Gaylord v. State, ex.rel., Department of Highways,* Okl., 540 P.2d 558, 561 (1975). Refusal to grant access does not, however, constitute an "overt" act leading to the exercise of dominion and control. *Gaylord,* supra, at 561; *Cook,* supra, at 1407. We are unaware of any authority, nor has authority been cited, which supports the appellant's contentions to the contrary.

III.

As an additional argument under his third proposition, the appellant alleges that juror misconduct was, in part, the cause of the verdict in favor of the city, and that the trial court erred when it did not grant a new trial when informed of the alleged misconduct. Primarily, the appellant's arguments are based on his post-trial realization that one of the jurors had a prior business relationship with the appellant and the belief that the juror harbored a grudge against the appellant. In support of these allegations the appellant offered the affidavits of himself, the bailiff, an alternate juror, and one juror.

The appellant's affidavit simply states that it was only when the trial had been completed that he became aware that the jury foreman, Gatewood, had lost a substantial amount of insurance business as a result of a business decision made by the appellant. The affidavit of the bailiff states that during the trial, juror Gatewood had asked the bailiff to provide him with a list of the juror's names and their seating arrangements; the request was refused. The alternate juror's affidavit states that Gatewood had stressed to her the fact that the appellant was wealthy and owned a 6,000 acre ranch in addition to the property at issue. She stated in the affidavit that she "was shocked to learn that the jury had returned a verdict for the City of Tulsa." Lastly, the affidavit of juror Roberts is offered which describes at length the deliberation process used by the jury and his perception that jury foreman Gatewood coerced the jury into its verdict.

The cases are legion in which this Court has ruled that affidavits, depositions and oral testimony of jurors may not be used to impeach a jury verdict. See: *Barnhart v. International Harvester Company*, Okl., 441 P.2d 1000, 1007 (1968), and cases cited therein. A single exception to this established rule exists by statute.

Title 12 O.S. 1981 §2606(B) authorizes jurors to testify regarding allegations of misconduct. The pertinent provisions of that statute state:

> "Upon an inquiry into the validity of the verdict..., a juror shall not testify as to any matter or statement occurring during the course of the jury's deliberations or as to the effect of anything upon his or another juror's mind or emotions as influencing him to assent or dissent from the verdict... or concerning his mental processes during deliberations. *A juror may testify on* the question *whether extraneous* prejudicial *information* was improperly brought to the jury's attention *or* whether *any outside influence* was improperly brought to bear upon any juror. . ." 12 O.S. 1981 §2606(B) (emphasis added).

See also: *Willoughby v. City of Oklahoma City,* Okl., 706 P.2d 883 (1985). An examination of the affidavit of juror Roberts in light of the above statute makes it patently obvious that all the allegations contained therein are inadmissible pursuant to 12 O.S. 1981 §2606(B). The remaining affidavits do not contain allegations of fact sufficient to support the grant of a new trial based on a finding of jury misconduct. *Willoughby,* supra; *Barnhart,* supra, *Holden v. Coussens,* Okl., 576 P.2d 758 (1978).

IV.

Lastly, the appellant argues that the trial court erred in refusing to submit a special interrorgatory to the jury, resulting in "a verdict whose basis is unknown". This argument is based on the premise that the jury could have found for the City of Tulsa on one of two possible theories: absence of significant impairment to constitute a de facto taking; or, that the appellant's claim was barred by the applicable fifteen-year statute of limitations, 12 O.S. 1981 §93(4); *Oklahoma City v. Wells,* Okl., 91 P.2d 1077, 1083 (1939).

A review of the transcript reveals that the appellant misstates the facts in this proposition of error. This transcript shows that the appellant did not request a special interrogatory prior to the time the jury was discharged. The settled rule regarding such propositions of error is that an objection to the form of a jury verdict is deemed waived unless an objection is made at the time the verdict is received and before the jury is discharged. *Miller v. Judd*, Okl., 429 P.2d 714, 717 (1967); *Morgan v. Oklahoma Natural Gas Co.*, Okl., 561 P.2d 1363 (1977).

V.

On cross-appeal, the city argues that the trial court erred when it denied the city's motions to assess the commissioners' costs against Oxley and when it denied the city's motion to assess costs of defending the action.

We are unable to address the merits of the issues raised on cross-appeal. The City of Tulsa/cross-appellant has failed to ensure that the record on appeal contains the order appealed from or any other necessary documents. No designation of record appears in this cross-appeal. Failure of an appellant to designate a record on appeal constitutes an abandonment and the appeal is subject to dismissal. *Matter of Burkhart's Estate*, Okl., 562 P.2d 1151 (1977). This Court is left with no record to examine. It is the cross-appellant's duty to ensure that there has been prepared a sufficient trial court record to show cause for reversal at the appellate level. *MFA Insurance Co. v. Jones*, Okl. App., 620 P.2d 472 (1980). *Hamid v. Sew Original*, Okl., 645 P.2d 496 (1982). The cross-appeal by the City of Tulsa is dismissed.

VI.

Accordingly, for the reasons stated herein, the judgment on the verdict for defendant City of Tulsa is AF-

FIRMED. The cross-appeal to the trial court's order charging the city with the Commissioners' costs and denying its motion for costs of defending the action is DISMISSED.

HARGRAVE, C.M., LAVENDER, SIMMS, DOOLIN and SUMMERS, JJ., concur;

OPALA, V.C.J., HODGES, WILSON and KAUGER, JJ., concur in part, dissent in part.

(Filed September 22, 1989)

IN THE
SUPREME COURT OF THE
STATE OF OKLAHOMA

No. 67,016

JOHN T. OXLEY,
Appellant,

v.

CITY OF TULSA, OKLAHOMA, a municipal corporation, by and through THE TULSA AIRPORT AUTHORITY,
Appellee.

ORDER

Petition for Rehearing of appellant Oxley is denied; Petition for Rehearing of the appellee, City of Tulsa, Oklahoma, is granted and said appellee's cross-appeal is hereby reinstated.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 21st DAY OF SEPTEMBER, 1989.

/s/ Rudolph Hargrave
Chief Justice

HARGRAVE, C.J., LAVENDER, SIMMS, DOOLIN and SUMMERS, JJ. concur.

OPALA, V.C.J., HODGES, WILSON and KAUGER, JJ., dissent from denying Oxley's rehearing petition; concur in reinstating Tulsa's cross-appeal.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS IN QUESTION

The Fifth Amendment to the United States Constitution provides (U.S. CONST. amend V):

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section one of the Fourteenth Amendment to the United States Constitution provides (U.S. CONST. amend XIV):

§1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; not deny to any person within its jurisdiction the equal protection of the laws.

Article II, section 7, of the Constitution of the State of Oklahoma provides (Okla. CONST. ART. II, §7):

§7. DUE PROCESS OF LAW

No person shall be deprived of life, liberty, or property, without due process of law.

Chapter 2, entitled "Acquisition of Land," of Title 66 of the Oklahoma Statutes, (Okla. Stat. Tit. 66 (1981)), entitled "Railroads," provides the applicable provisions of the Oklahoma statutory regulation of procedures applicable to eminent domain proceedings. Various sections of that Title and Chapter provide, in relevant part, as follows:

§51. Power to enter upon and appropriate lands

Every railroad corporation incorporated under this Article, and any railroad corporation authorized to construct, operate or maintain a railroad within this State, has power and is authorized to enter upon any land for the purpose of examining and surveying its railroad, and to take, hold and appropriate so much real estate as may be necessary for the location, construction and convenient use of its roads, including all necessary grounds for buildings, stations, workshops, depots, machine-shops, switches, sidetracks, turntables, snow defences, and water stations; all material for construction of such road and its appurtenances, and the right of way over adjacent land sufficient to enable such corporation to construct and repair its road and the right to conduct water to its water stations, and to construct and maintain proper drains, and may obtain the right to such real estate by purchase or condemnation in the manner provided by law. Okla. Stat. Tit. 66, §51 (1981)

§52. Purchasing or taking realty

Any railroad corporation may purchase and use real property for a price to be agreed upon with the owners thereof; or the damages to be paid by such corporation for

any real property taken as aforesaid, when not agreed upon, shall be ascertained and determined as hereinafter provided. Okla. Stat. Tit. 66, §52 (1981)

§54. Compensation, accrual of right to

When possession is taken or property condemned, as provided herein, the owner shall be entitled to the immediate receipt of the compensation awarded, without prejudice to the right of either party to prosecute further proceedings for the judicial determination or the sufficiency or insufficiency of said compensation. Okla. Stat. Tit. 66, §54 (1981)

§55. Review of commissioner's report-Jury trial-Notice-Costs

(A) The report of the commissioners may be reviewed by the district court on written exceptions filed by either party, in the clerk's office within thirty (30) days after the filing of such report; and the court shall make such order therein as right and justice may require, either by confirmation, rejection or by ordering a new appraisement on good cause shown; or either party may within sixty (60) days after the filing of such report file with the clerk a written demand for a trial by jury, in which case the amount of damages shall be assessed by a jury, and the trial shall be conducted and judgment entered in the same manner as civil actions in the district court. . . .

(B) Within ten (10) days after the report of commissioners is filed, the court clerk shall forward to the attorney of record for the condemnor, the attorney of record for each condemnee, and to all unrepresented condemnees, a copy of the commissioners' report and a notice stating the time limits for filing an exception or demand for jury trial as specified in paragraph (A) of this section. . . .

(C) The time limits for filing an exception and demand for jury trial, as prescribed in paragraph (A) of this section, shall be calculated from the date the report of the commissioners is filed in the case. . . . Okla. Stat. Tit. 66, §55 (1981)

§57. Provisions applicable to all corporations and to state-Proceedings by state-Determination of character of use-Assessment of damages when land taken without condemnation

The provisions of this article with reference to eminent domain shall apply to all corporations having the right to eminent domain, and shall apply to the State of Oklahoma and its various educational, reformatory, penal and eleemosynary institutions, including departments of state having the power to purchase real property for public purposes, and such institutions and departments shall have the right under this article to acquire fee simple title to the property taken. . . . Okla. Stat. Tit. 66, §57 (1981)

Title 27 of the Oklahoma Statutes entitled "Eminent Domain," provides in section 13 thereof as follows (Okla. Stat. Tit. 27, §13 (1981)):

§13. Policies

Any person, agency or other entity acquiring real property for any public project or program described in Section 1 of this act shall comply with the following policies:

1. Every reasonable effort shall be made to acquire, expeditiously, real property by negotiation.

2. Real property shall be appraised before the initiation of negotiations, and the owner or his designated representative shall be given an opportunity to accompany the appraiser during his inspection of the property.

3. Before the initiation of negotiations for real property, an amount shall be established which is reasonably believed to be just compensation therefor and such amount shall be promptly offered for the property. In no event shall such amount be less than the approved appraisal of the fair market value of such real property. Any decrease or increase in the fair market value of the real property prior to the date of valuation caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for such improvement, other than that due to physical deterioration within the reasonable control of the owner, will be disregarded in determining the compensation for the property. The owner of the real property to be acquired shall be provided with a written statement of, and summary of the basis for, the amount established as just compensation. Where appropriate, the just compensation for the real property acquired and for damages to remaining real property shall be separately stated.

4. No owner shall be required to surrender possession of real property before the agreed purchase price is paid or deposited with the state court, in accordance with applicable law, for the benefit of the owner of an amount not less than the approved appraisal of the fair market value of such property, or the amount of the award of compensation in the condemnation proceeding of such property.

5. The construction or development of a public improvement shall be so scheduled that, to the greatest extent practicable, no person lawfully occupying real property shall be required to move from a dwelling, assuming a replacement dwelling, as required by the Oklahoma Relocation Assistance Act of 1971, will be available, or to move his business or farm operation without at least ninety (90) days' written notice from the date by which such move is required.

6. If any owner or tenant is permitted to occupy the real property acquired on a rental basis for a short term or for a period subject to termination on short notice, the amount of rent required shall not exceed the fair rental value of the property to a short-term occupier.

7. In no event shall the time of condemnation be advanced, on negotiations or condemnation and the deposit of funds in court for the use of the owner be deferred, or any other coercive action be taken to compel an agreement on the price to be paid for the property.

8. If an interest in real property is to be acquired by exercise of power of eminent domain, formal condemnation proceedings shall be instituted. The acquiring authority shall not intentionally make it necessary for any owner to institute legal proceedings to prove the fact of the taking of his real property.

9. If the acquisition of only part of the property would leave its owner with an uneconomic remnant, an offer to acquire the entire property shall be made. Okla. Stat. Tit. 27, §13 (1981). In July, 1988, this section was amended in part and additional provisions were added. Neither the amendments nor the additions apply to, or affect, the outcome of the present dispute.

The City of Tulsa Master Plan and the Airport Noise Control and Land Use Compatibility Study, referred to by its acronym ANCLUC, are planning tools which have been used by the City and the Airport Authority to guide, and have virtually dictated, the development and expansion of Tulsa International Airport. In relevant part, the Master Plan provides at page 218, as follows:

AIRPORT LAYOUT PLAN

LAND ACQUISITION

> A third area of acquisition is located immediately south of the recently completed Port Road. This property is also bounded on three sides by the airport. The recommendation to acquire this area is based on several environmental considerations and to provide protection for the airport against the encroachment of incompatible land uses which could reduce the airport's ability to safely and efficiently operate. . . . This area will also provide for general aviation apron and hangar expansion as well as an area for future industrial development.

The Master Plan also provides, at page 423, that "the area between the north/south runways is surrounded on three sides by the airport . . . . This area will be utilized for airport expansion and activities."

The Master Plan also provides, at page 229, as follows: "[I]t is proposed that the area immediately to the west of runway 17L/35R and along Memorial Road be designated as a location for potential aviation industrial sites."

With respect to noise measurement levels, which were designated in the ANCLUC study by an Ldn categorization, the Master Plan recorded its measurements by a categorization known as Composite Noise Ratings (CNR).

Oxley's property was within the CNR-3 zone. That zone was described in the Master Plan as follows: "The highest noise level; concentrated group action would probably be taken by the community."

With respect to the effects that noise would have on potential development of property surrounding the airport, the Master Plan provided, in Figure 6-15, as follows:

FIGURE 6-15

LAND USE CONSIDERATIONS FOR CNR ZONE 3

NEW DEVELOPMENT TO BE RESTRICTED

Primary Metal Industries
Fabricated Metal Products
Communications
All Retail Trade Activities, Except Construction
Services and Eating and Drinking
Nature Exhibits
Sports Assembly
Water Based Activities
Playground and Neighborhood Parks
Community and Regional Parks

NEW DEVELOPMENT TO BE PROHIBITED

Residential, All Kinds
Retail Trade, Eating and Drinking
Government Services
Educational Services
Miscellaneous Services
Cultural Activities
Entertainment Assembly
Public Assembly
Resorts and Group Camps
Professional, Scientific, and Controlling Instruments

Source: BECO-MJM-RDS Analysis

The Master Plan was updated by an Airport Noise Control and Land Use Compatibility Study & Master Plan Update. ANCLUC provides:

Table 24

RUNWAY UTILIZATION
Tulsa International Airport

Operational Category	RUNWAY						Total
	17L	35R	17R	35L	8	26	
Air Carrier	67%	31%	---	---	1%	1%	100%
Air Taxi	67%	31%	---	---	1%	1%	100%
Military	67%	31%	---	---	1%	1%	100%
Business Jet	40%	19%	27%	12%	1%	1%	100%
Other General Aviation	7%	5%	60%	26%	1%	1%	100%

Table 28

AVERAGE DAILY AIRCRAFT OPERATIONS
Tulsa International Airport

AIRCRAFT TYPE	DAILY OPERATIONS
Air Carriers:	
727-100,-200	56
737-200	30
DC-9-15,-32	18
707-320	2
Subtotal	106
Air Taxi:	
Metroliner	44
Subtotal	44
Military:	
Helicopter	3
A-7	25
F-4	4
Subtotal	32
General Aviation:	
Business Jet (turbojet)	38
Business Jet (turbofan)	26
Single Engine (piston)	175
Twin Engine (piston)	140
Twin Engine (turboprop)	57
Subtotal	436
TOTAL	618

* * *

RESULTS

Measurement Results

The measurement program was conducted over a two-week period in January, 1981 and an additional two-week period in April, 1981. The time spent at the sites averaged two days per site at each of the aircraft sites and one-half day per site for the ambient sites. A total of over 800 jet aircraft were measured during the survey. The raw data collected during the measurement survey for aircraft (flyovers and engine runups) is given in the Appendix.

The results of the aircraft noise measurements at Sites one through ten were condensed and combined with the annual operational assumptions to generate an Ldn noise level. These noise levels are due to aircraft noise only and include engine runup data. The results are depicted in Table 33.

Table 33
RESULTS OF AIRCRAFT NOISE MEASUREMENTS
Tulsa International Aircraft

LOCATION	L_{dn} NOISE LEVEL
Site 1	75.5
Site 2	65.4
Site 3	64.6
Site 4	60.5
Site 5	71.1
Site 6	74.1
Site 7	67.8
Site 8	66.1
Site 9	66.8
Site 10	66.3*

*Engine runup from American Airlines was not measured. With this included, the Ldn noise level would be 70.3.

The results of the ambient noise measurements at each site are depicted in Table 34 in terms of the Leq index. For most of the sites the ambient data is derived from combining the data from a number of different measurements at different time periods throughout the day. The results are a measurement of all noise sources at the site except the noise from any aircraft events.

Table 34

RESULTS OF AMBIENT NOISE MEASUREMENTS

LOCATION	DAYTIME LEQ	LAND USE
Site 1	51	Residential
Site 2	52	Residential
Site 3	58	School Park/Residential
Site 4	54	Residential
Site 5	51	Park/Open Space
Site 6	63	Graze Land
Site 7	53	School/Residential
Site 8	55	Residential
Site 9	56	Airport Property/Residential
Site 10	53	Residential
Site 11	62	Industrial
Site 12	64	Residential
Site 13	57	School
Site 14	54	Residential

(Continued on Next Page)

Table 34

RESULTS OF AMBIENT NOISE MEASUREMENTS

LOCATION	DAYTIME LEQ	LAND USE
Site 15	57	Residential
Site 16	57	Residential
Site 17	53	Residential
Site 18	54	Residential
Site 19	51	Zoo/Open Space
Site 20	59	Industrial

The results of the aircraft and ambient measurements for each site are discussed in the following paragraphs.

Site One. Residential. Site one is located between the the runways to the north of the airport. The site is exposed to various airport noise sources, including departure noise, arrival thrust reversal, taxi noise and engine test runups.

Being adjacent to the airport, this site receives a more continuous impact from noise due to both departures and arrivals at the same time and from taxiing aircraft. The nighttime engine runup from the American Airlines maintenance facilities was found to be a major noise source affecting the site. A noise monitor was left at this site to continuously record the noise environment for five nights (results are given in the Appendix). On two of these evenings, hourly Leq's from engine runup were measured at greater than 76 dB(A). While the maximum noise levels from the engine runup is below that of departure noise, the duration is much longer, lasting at times far more than two hours.

Site Two. Residential. Site two was designed to measure the noise environment in the community south of the airport. There are no major non-aircraft generated noise sources nearby. The site is located directly south of the centerline of Runway 17L/35R. Aircraft departing Runway 17L will commonly overfly this site before turning in the direction of their destinations. The dominant source of the aircraft noise is from departing 727's and A-7's.

Site Three. School Park and Residential. Noise levels between the runways south of the airport and the noise from I-44 were recorded at this site. A number of aircraft departing southward will overfly the site. The maximum noise level from an aircraft flyover was 96 dB(A) by three A-7's departing in formation. The site is also exposed to noise from I-44, which measured an ambient noise level of an Leq of 58 dB(A).

Site Four. Residential. Noise levels due to aircraft operations southeast of the airport were recorded at this site. Aircraft departing on Runway 17 to eastern destinations will commonly turn and overfly this site. The maximum noise level from an aircraft flying overhead was 92 dB(A). There are no major non-aircraft noise sources in the vicinity.

Site Five. Open Space Park Land. This site was selected primarily for calibration of the noise contours. There are no noise sensitive land uses in the vicinity. The measured Ldn for the site was 71.1 dB(A). The ambient Leq was recorded at 52 dB(A).

Site Six. Open Space/Grazing Land. Site six was also designed primarily for calibration of the noise contours. The loudest aircraft operations were the A-7 formation departures. The maximum noise level for one of these events was 107 dB(A). The ambient noise levels from State Highway 11 was measured at an Leq of 63 dB(A).

Site Seven. Mingo School and Residential. This site is exposed to noise from aircraft operations and engine runups. There are no major ambient noise sources in the vicinity (maximum noise levels from train operations was 72 dB(A)). The Air National Guard base is located nearby, and prior to departure of the A-7 aircraft, engine runups occur for a period of time. During the measurement survey, A-7 engine runups were recorded on a number of occasions. The noise levels from these runups averaged an Leq of 74 dB(A) for twenty minutes. Runway 17L departures during the ground roll resulted in loudest operations recorded at this site. A group of six A-7's generated a maximum noise level of 93 dB(A).

Site Eight. Residential. This site was designed to determine the aircraft noise environment just south of the airport and between the two parallel runways. There are no major non-aircraft noise sources in the vicinity. The dominant noise source affecting the site resulted from departures off of Runway 17L. Most of the noise is due to sideline noise. It is rare that an aircraft will fly overhead.

Site Nine. Residential and Open Space. This site is located very close to the departure end of Runway 17R. The dominant aircraft noise at the site resulted from business jet departures on this runway. Maximum noise levels recorded at the site from a Jet Commander departure was 105 dB(A). The Frisco train generated a maximum noise level at the site of 77 dB(A).

Site Ten. Residential. Site ten is located close to Runway 17R/35L and a number of general aviation FBO's. Business jet departures on this runway and engine runups from the FBO's and American Airlines are the major noise sources on the site. There is a substantial amount of engine runup noise from the FBO's. This includes both business jets, turboprop and piston aircraft. While the

noise from piston aircraft runups are quieter, the runups are more often.

Site Eleven. Industrial. Site eleven measured the noise levels from military aircraft on the downwind leg and from traffic noise on the Mingo Valley Expressway. The peak noise from an F-4 flying overhead measured 80 dB9(A). The ambient Leq due to the Expressway was measured at 62 dB(A).

Site Twelve. Residential. This site is located adjacent to State Highway 11 at the same distance from the roadway as the front yards of these residences are. Measurements recorded the noise levels from State Highway 11 and peak noise levels from aircraft operations. The ambient noise level due to roadway usage was recorded at 64 dB(A). The maximum noise level from an aircraft flyover, a departing Lear Jet on Runway 17R, was measured at 90 dB(A).

Site Thirteen. School. Site thirteen measured the noise levels at John Ross Elementary School. The ambient noise environment was measured at 57 dB(A). The maximum noise levels recorded from a flyover event was 92 dB(A) (departing A-7). There are no other major noise sources in the area.

Site Fourteen. Residential. This site is located to the north of the crosswind runway and between the two parallel runways. It was used primarily for fine tuning the noise contours for the area between the two runways.

Site Fifteen. Residential. This site is located very close to the taxiways for Runway 17L/35R. It was used for additional fine tuning of the noise contours for the area between the runways. This site is exposed to a similar noise environment as Site One except thrust reversal and taxi noise is much louder at this site.

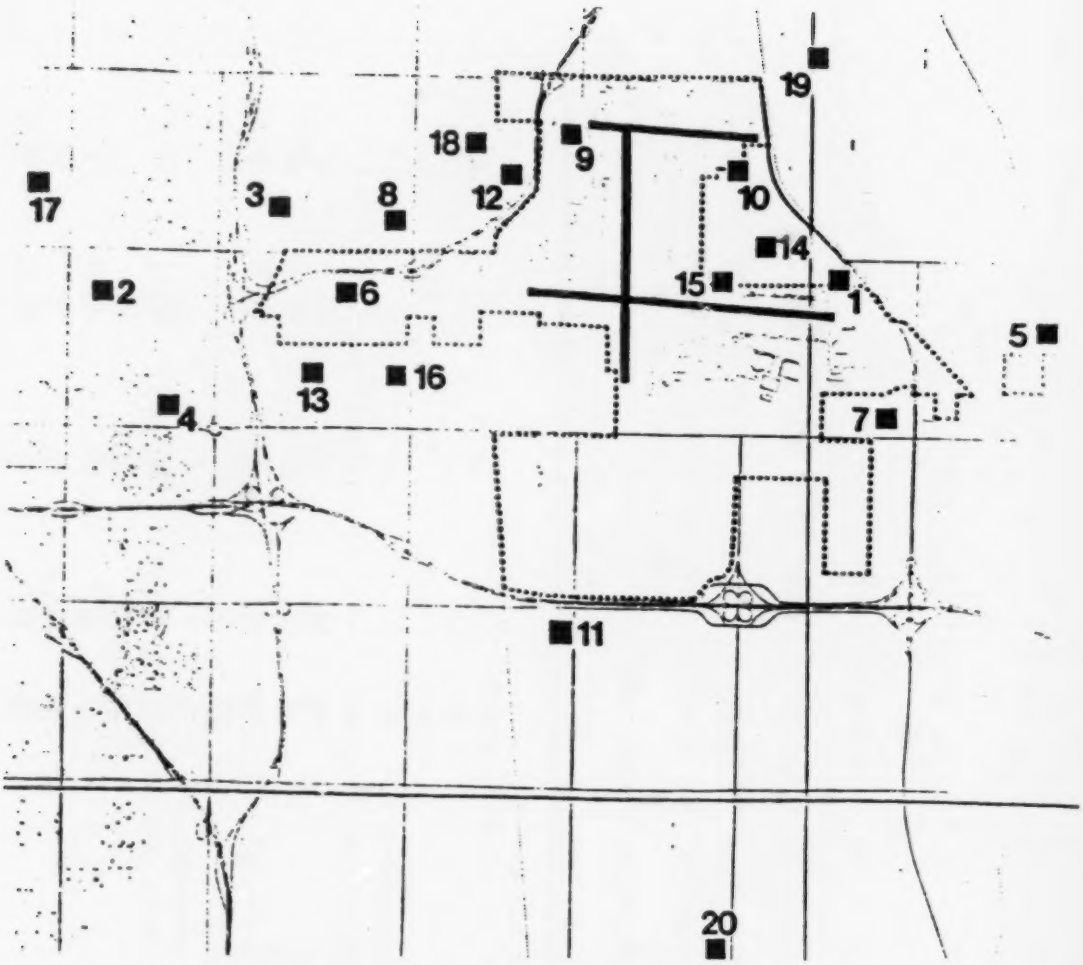
Site Sixteen. Residential. Site sixteen measured the sideline noise in the residential neighborhood southeast of the airport. Occasional military aircraft in the touch and go pattern will overfly the site. The maximum noise level recorded from a departing jet was 87 dB(A).

Site Seventeen. Residential. Site seventeen is located almost directly south of the airport. The major airport noise sources at the site were from departures on Runway 17L. The noise exposure at this site is very close to the levels recorded at Site Two, located just to the east.

Site Eighteen. Residential. Site eighteen recorded the noise due to the Frisco Railroad operations. The site is located seventy-five feet from the centerline of the railroad tracks. The rear edge of the yards for these homes are located within this distance. The maximum noise levels from railroad noise was recorded at 96 dB(A). The railroad operations take place eighteen times per day. The maximum noise level recorded from a jet departure was 98 dB(A) (Lear Jet on Runway 17R).

Site Nineteen. Zoo. This site permitted measurements of the noise levels at the Tulsa Zoo. The ambient noise environment was recorded at an Leq of 51dB(A). The maximum noise level recorded by an aircraft operation was a Lear Jet departure which generated a peak noise level of 84 dB(A). Occasional general aviation aircraft that overfly the site will commonly generate this high of noise level or louder.

Site Twenty. Industrial. Site twenty was designed to record the noise environment at the gravel pit operations east of the airport. No blasting took place during the time of the measurement survey. However, the ambient noise levels in this area was measured at 50 dB(A).



Airport Boundary
Runway
Study Area
Site Location
8 Site Designator

TULSA INTERNATIONAL AIRPORT
NOISE CONTROL AND LAND USE
COMPATIBILITY STUDY

N

FIGURE 13 NOISE MEASUREMENT SITES

Figure 18

LAND USE COMPATIBILITY MATRIX

LAND USE	YEARLY DAY-NIGHT AVERAGE SOUND LEVEL (Ldn) IN DECIBELS					
	65	65-70	70-75	75-80	80-85	85
Residential other than mobile homes & transient lodgings	●	○(1)	○(1)	○	○	○
Mobile home parks	●	○	○	○	○	○
Transient lodgings	●	○(1)	○(1)	○(1)	○	○
Schools, hospitals & nursing homes	●	25	30	○	○	○
Churches, auditoriums & concert halls	●	25	30	○	○	○
Governmental services	●	●	25	30	○	○
Transportation	●	●	●(2)	●(3)	●(4)	●(4)
Parking	●	●	●(2)	●(3)	●(4)	○
Offices, business & professional	●	●	25	30	○	○
Wholesale & retail-building materials, hardware & farm equipment	●	●	●(2)	●(3)	●(4)	○
Retail trade--general	●	●	25	30	○	○
Utilities	●	●	●(2)	●(3)	●(4)	○
Communication	●	●	25	30	○	○
Manufacturing, general	●	●	●(2)	●(3)	●(4)	○
Photographic & optical	●	●	25	30	○	○

Agriculture (except livestock) & forestry	●	●(6)	●(7)	●(8)	●(8)	●(8)
Livestock farming & breeding	●	●(6)	●(7)	○	○	○
Mining & fishing, resource production & extraction	●	●	●	●	●	●
Outdoor sports arenas & spectator sports	●	●(5)	●(5)	○	○	○
Outdoor music shells, amphitheaters	●	○	○	○	○	○
Nature exhibits & zoos	●	●	○	○	○	○
Amusements, parks, resorts & camps	●	●	●	○	○	○
Golf courses, riding stables & water recreation	●	●	25	30	○	○

See Appendix for Reference to Notes.

SLUCM — Standard Land Use Coding Manual.

● (Yes) — Land Use & related structures compatible without restrictions.

○ (No) — Land Use & related structures are not compatible & should be prohibited.

NLR — Noise Level Reduction (outdoor to indoor) to be achieved through incorporation of noise attenuation into the design and construction of the structure.

25, 30, or 35 — Land Use & related structures generally compatible; measures to achieve NLR or 25, 30 or 35 must be incorporated into design & construction of structure.

* * *

e. Land Acquisition

As outlined in preceding narrative, the residential areas south of the airport are the most heavily impacted of all areas in the airport environs within the 65 Ldn noise contours. However, a portion of the residential area between the parallel runways and south of Port Road is the only incompatible use area within the 75 Ldn noise level, with the remainder of the area falling within the 70 Ldn noise level. Although several options are available to abate noise south of the airport, the location of the residential area south of Port Road limits the available options for noise abatement. Measures 12, 13 and 14 have been proposed as a possible means of minimizing impacts, since a major noise contributor to the area is from engine runups. However, these measures are effective to limited degree and have no affect on noise impacts attributable to landings and take-offs on the parallel runway pair. An acquisition and relocation program could provide impetus to the development of compatible uses in the area. Therefore, for the preceding reasons, the following measure is proposed:

- Measure 15 - Acquire all land between the parallel runway pair and south of Port Road which is exposed to noise levels in excess of 70 Ldn.

A program for land acquisition west of the passenger terminal area has been underway the past several years. This program was designed to mitigate incompatible land uses in an area surrounded by aircraft, vehicular and industrial access traffic. Noise levels attributable to aircraft exceed 65 Ldn in the area and approach 70 Ldn. Vehicular traffic on the Gilcrease Expressway contributes to the total noise exposure of the area. It is presented as Measure 16 that the land acquisition program for the area be continued to fully mitigate the incompatible residential uses which remain.

* * *

- Measure 15. Acquisition of All Land Between the Parallel Runway Pair and South of Port Road Which Is Exposed to Noise Levels in Excess of 70 Ldn.

1. Noise Impacts Factor. This land acquisition will be the most effective means of mitigating noise impacts which now exist on the north side of the airport; however, it is also the most disruptive. All of the residential area presently within the 70 Ldn contour will be removed, leaving only a small area of residential development within the 70 Ldn on the south side of the airport.

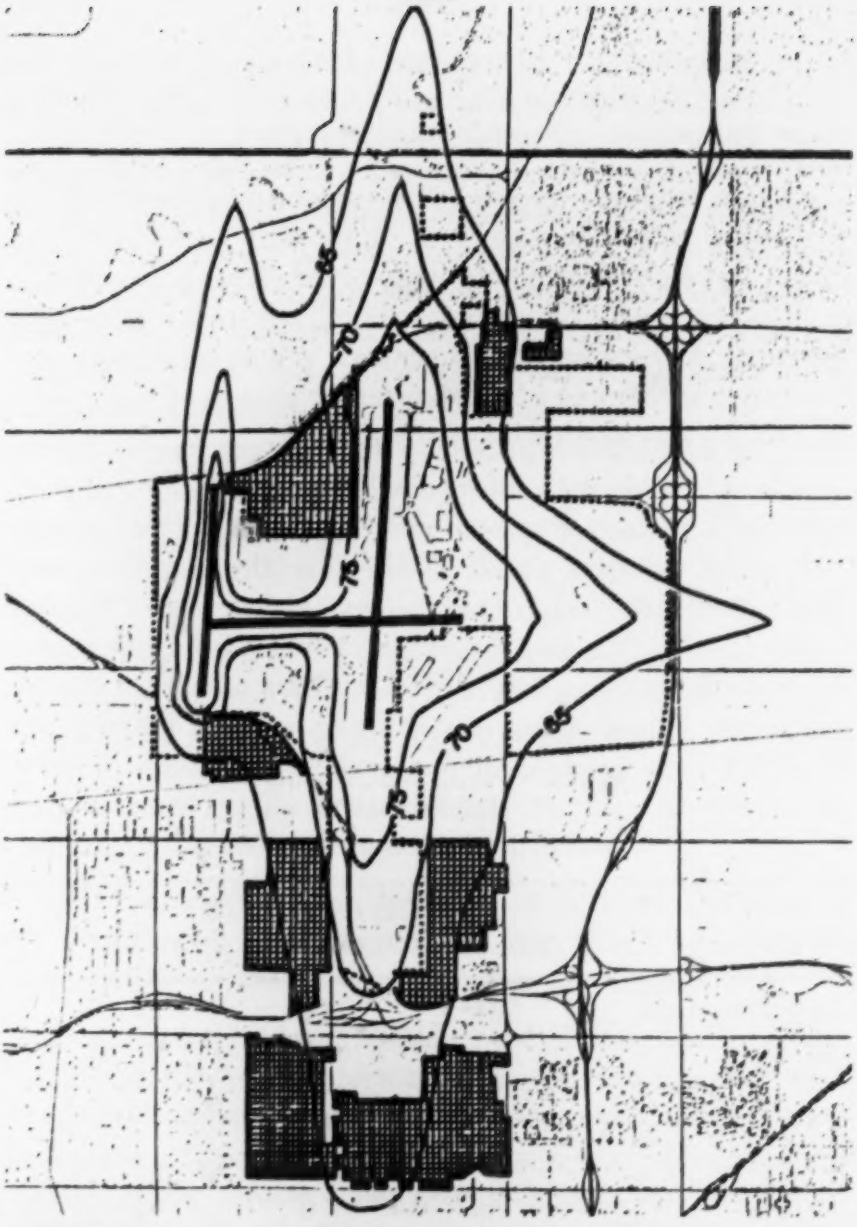
* * *

Table 40

INCOMPATIBLE LAND USES
WITHIN NOISE CONTOURS
(In Acres)
Tulsa International Airport

SCENARIO	NOISE CONTOUR Ldn 65	Ldn 70	Ldn 75	TOTAL
Existing Situation	931	264	64	1259
Future Case	606	33	0	639
Scenario 1	409	2	0	411
Scenario 2	Insignificant Change for all Contours			
Scenario 3	358	0	0	358
Scenario 4	671	187	45	903
Scenario 5	712	194	47	953

* * *



Airport Boundary
Runway
Study Area

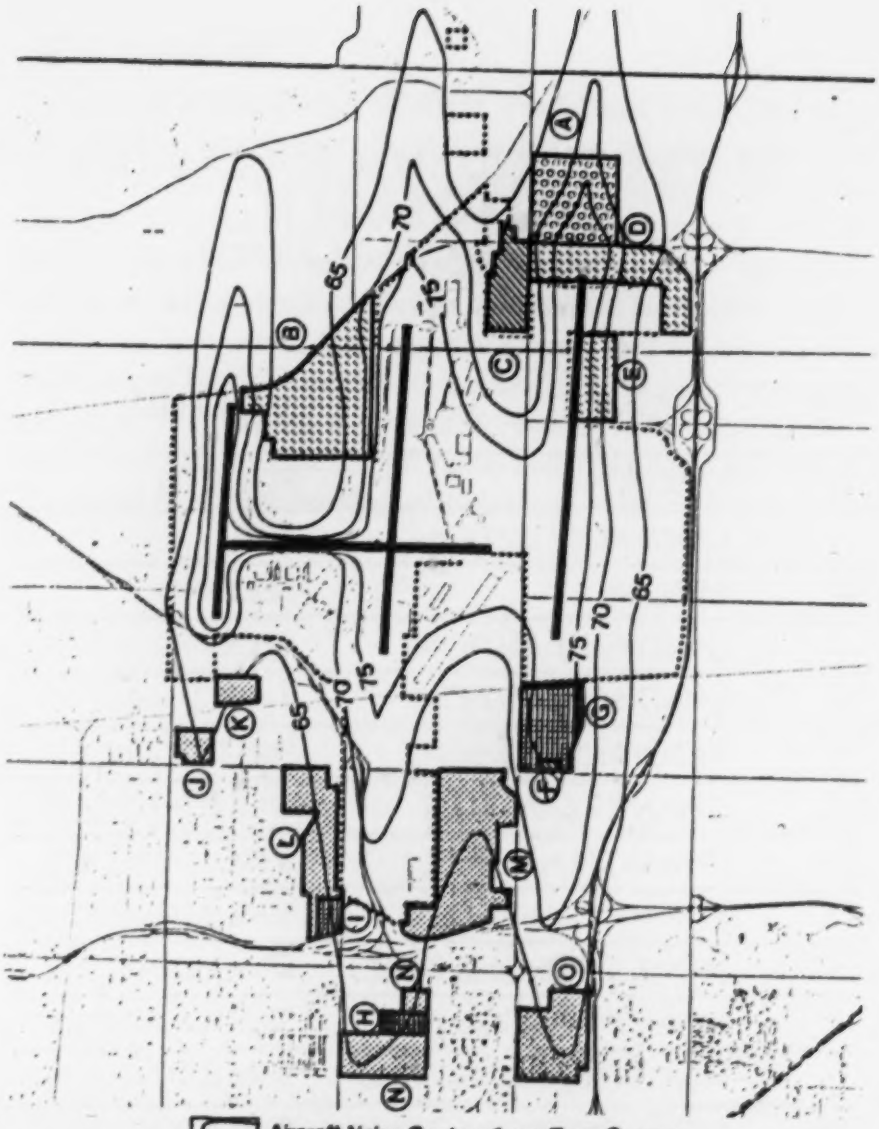
Aircraft Noise Contour/Short-Term Course
Areas of Incompatibility

TULSA INTERNATIONAL AIRPORT
NOISE CONTROL AND LAND USE
COMPATIBILITY STUDY

FIGURE 32

INCOMPATIBLE AREAS BASED ON EXISTING ZONING/ SHORT-TERM COURSE

N



Aircraft Noise Contour/Long-Term Course

Airport Boundary
Runway
Study Area

Easement Acquisition
Zoning Change
Land Acquisition

Land Use Designation Change
Remaining Incompatibilities
Area Designator

TULSA INTERNATIONAL AIRPORT
NOISE CONTROL AND LAND USE
COMPATIBILITY STUDY

LAND USE PLAN
IMPLEMENTATION STRATEGIES

FIGURE 36

Table 46

TREATMENT AND SEQUENCE MATRIX FOR EACH PARCEL

TULSA INTERNATIONAL AIRPORT

PARCEL	TREATMENT	SEQUENCE
A	EASEMENT	FOURTH
B	LAND ACQUISITION	FIRST
C	REZONE	SECOND
D	LAND ACQUISITION	SECOND
E	LAND ACQUISITION	THIRD
F	REZONE (EASEMENT)	FIRST (FOURTH)
G	CHANGE LAND USE	SIMULTANEOUS
H	CHANGE LAND USE	SIMULTANEOUS
I	CHANGE LAND USE	SIMULTANEOUS
J	NOISE ENVIRONS ZON.	SIMULTANEOUS
K	NOISE ENVIRONS ZON.	SIMULTANEOUS
L	NOISE ENVIRONS ZON.	SIMULTANEOUS
M	NOISE ENVIRONS ZON.	SIMULTANEOUS
N	NOISE ENVIRONS ZON.	SIMULTANEOUS
O	NOISE ENVIRONS ZON.	SIMULTANEOUS

* * *

Land Acquisition

For the residential area south of Port Road lying between the parallel runways, a land acquisition program is envisioned as the most effective long-term technique for making the area compatible with airfield operations. Similarly, a program to acquire residential properties adjacent to the existing terminal should be pursued to ensure a compatible environment between the airport and its neighbors. Additional land will need to be acquired in the northeast sector of the airfield to accommodate a third parallel runway. Additional discussion regarding land acquisition can be noted in a later section of this document.

* * *

- Land Acquisition. The program to purchase incompatible properties, already initiated by the Tulsa Airport Authority, should be pursued in the impacted areas previously designated. It is believed that at least 50 percent of these properties could feasibly be purchased in the short-term course, provided land acquisition can be given high enough priority in the airport budget. The properties closest to Runway 17L-35R should be given the highest priority since they are more heavily impacted by aircraft operations and run-up noise.

* * *

Land Acquisition

Land acquisition is the most secure way of avoiding incompatible land uses, protecting the airport from encroachment and providing for airport expansion, but at the same time it is the most expensive method of ensuring development control. There are three parcels of land recommended for fee simple acquisition (B, D, and E), while Parcel A is recommended for either fee simple acquisition or the purchase of an avigation easement. Parcel B is the largest and most sensitive to immediate noise impacts. It is also already programmed for acquisition and some parcels are currently being purchased. Although, in the long term, the aircraft-related noise contours do not encompass the majority of this area, planned and existing FBO and maintenance operations will present considerable noise impacts in the area. To prevent even greater land use incompatibilities, to eliminate existing land use incompatibilities and to provide for needed airport expansion, it is recommended that this area be purchased as soon as feasible.

* * *

Table 47

LAND USE IMPLEMENTATION SEQUENCE

TULSA INTERNATIONAL AIRPORT

ACTION	TIME FRAME			
	1982	1985	1990	1995
Airport Environs Zoning	●			
Building Code Modifications	●			
Sound Attenuation Program	●			
Land Acquisition A				●
B	●			
D		●	●	
E		●	●	
F				●
Rezone C	●			
F	●			
Redesignate Land Use G		●		
H		●		
I		●		

* * *

Supreme Court, U.S.
FILED
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CLERK

No. 89-1007

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JOHN T. OXLEY,
Petitioner

v.

CITY OF TULSA, OKLAHOMA, a municipal corporation, by and through the TULSA AIRPORT AUTHORITY,
Respondent.

ON WRIT OF CERTIORARI TO THE OKLAHOMA SUPREME COURT

BRIEF OF RESPONDENT

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January, 1990

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QUESTION PRESENTED FOR REVIEW

Whether a state court verdict supported by the law and the evidence, which was rendered by a jury considering all facts urged by a petitioner and considering jury instructions that were not objected to by a petitioner, presents a special or important reason for granting a writ of certiorari.

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OPINION BELOW

The opinion of the Supreme Court of Oklahoma rendered March 28, 1989, is reprinted in the Appendix to the petitioner's petition for writ of certiorari at Page A1.

STATEMENT OF JURISDICTION

The jurisdiction of the Court has been invoked by the petitioner under Title 28, United States Code, Sections 1257(3) and

2101(c) (1982). The opinion of the Supreme Court of Oklahoma was rendered on March 28, 1989. The petitioner's request for rehearing was denied on September 21, 1989.

CONSTITUTIONAL PROVISIONS AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides (U.S. CONST. amend. V):

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Section one of the Fourteenth Amendment to the United States Constitution provides (U.S. CONST. amend. XIV, §1):

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the priviliges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. Article II, section 7, of the Constitution of the State of Oklahoma provides (OKLA. CONST. art. II, §7):

No person shall be deprived of life, liberty or property, without due process of law.

4. Article II, section 24, of the Constitution of the State of Oklahoma provides (OKLA. CONST. art. II, §24):

Private property shall not be taken or damaged for public use without just compensation . . .

STATEMENT OF THE CASE

This case arises out of the District Court in and for Tulsa County, Oklahoma. The petitioner, John Oxley, was the plaintiff in the trial court and the appellant in the Oklahoma Supreme Court. The respondent, the City of Tulsa, Oklahoma by and through the Tulsa Airport Authority, was the defendant and the appellee respectively below. The parties will be referred to in this brief as "Oxley," the "City of Tulsa," and the "Airport Authority." The respondent is constrained to restate the case and facts since the petitioner's presentation contains inaccuracies and statements that are not supported by the record.

The following symbols shall be employed:

1. "TR" for Transcript of Record;

2. "PX" for Plaintiff's Exhibit; and

3. "DX" for Defendant's Exhibit.

Purchase of property next to the expanding Airport—Historical Summary.

In 1973 Oxley moved from a 60 acre tract of land which he owned in Tulsa, Oklahoma. (TR. 107.) Oxley moved from the property for one reason: Aircraft noise originating from his neighbor's land had made the property unsuitable for residential use and for raising horses; his neighbor was Tulsa International Airport ("Airport"). (TR. 97, 100.) For years, the noise

from the Airport had interfered with Oxley's use of the property for residential purposes. (TR. 105, 106, 123, 124 and 305.) In fact when Oxley first moved to the property in 1951, the residential use was chronically interfered with as a result of noise from overflights of large military aircraft from the Douglas bomber factory. The bomber factory had been located to the southeast of the 60 acre tract of land since World War II. The runway from the bomber factory pointed right to the Oxley property and the extremely noisy military aircraft (such as the large four-engine stratojet bomber) took off and landed through airspace adjacent to Oxley's property. (TR. 103, 410, 411, 412 and 413.) Later, in 1952, the east runway at the Airport was extended to its present length of 10,000 feet. With the runway extension in 1952, the entire east side of the Oxley property was parallel to the main, east runway. (TR. 100 and 104.)

In addition to large military aircraft operations, commercial aircraft began utilizing the east runway in the early 1960's. (TR. 104, 105 and 124.) In 1961 Taxiway Alpha was extended parallel to the full length of the west side of the east runway. (TR. 505.) The military jet aircraft using the runway in the late 1950's and 1960's were as noisy as military aircraft now operating at the Airport, and the commercial jet aircraft operating in the 1960's were much noisier than the new generation aircraft now operating at the Airport. (TR. 412, 789, 791 and 792.)

By the late 1960's, the Airport-related noise had become unbearable to the Oxleys. (TR. 105 and 124.) In fact, as early as 1968, residential use of the Oxley property was incompatible with noise levels produced at the Airport. (TR. 792, 812, 813, 831, 832, 834 and 835.) Because of the significant noise levels, Oxley repeatedly approached the Tulsa Airport Authority (the agency of the City of Tulsa charged with the operation of the

Airport) and asked that his property be purchased. (TR. 175, 177, 179, 199 and 201.) The Airport Authority desired to comply with his repeated requests, but Oxley and the Airport Authority were never able to agree upon a price. (TR. 1179.)

Oxley moved from the property, but continued to use it for rental income purposes.

In 1973 Oxley moved from the 60 acre tract of land to a 6,000 acre ranch about five (5) miles northeast of the Airport. (TR. 134, 135 and 137.) Thereafter he rented the houses on the 60 acre tract of land to, as Oxley stated at trial, "some poor people." (TR. 108.) Even though Oxley received as much as $1,900.00 per month in rentals from the residential occupants (DX 1), it was his opinion that after 1973 the highest and best use of the 60 acres was not for residential use, but for light industrial, commercial development. (TR. 148.)

The Airport Authority conducted a noise study and determined that residential use of the property was incompatible with existing noise levels.

In the early 1980's the Airport Authority conducted an Airport Noise Compatibility and Land Use Study ("ANCLUC"). (TR. 209.) The purpose of the ANCLUC study was to officially determine whether uses of land near the Airport were compatible with noise levels generated from the Airport. The ANCLUC study also included an update of the Airport Master Plan originally adopted in 1975. (TR. 209, 210, 211, 850, 851 and 852.) The study was intended to be a planning document whereby the Airport Authority could provide for orderly, continued development of the Airport. (TR. 211 and 212.) The ANCLUC study identified certain land use areas near the Airport which were incompatible with Airport-related noise. (TR. 853 and 854.) As a condition to receipt of federal funds for Air-

port expansion, it was required that the identified, incompatible land use areas be made compatible with the Airport. (TR. 209 and 210.) The ANCLUC study recommended that residential use areas be made compatible by modifying the existing land use to uses which are compatible with Airport noise levels, such as light industrial and commercial uses. (DX 5, TR. 391, 392, 467 and 468.)

The Airport Authority commenced the process of acquisition of the Oxley Property.

In June, 1982, based upon a preliminary draft of the ANCLUC Study, the Airport Authority authorized acquisition of certain residential properties near the Airport, including the Oxley Property. (TR. 367, 368, 371 and 372, PX 32.) The recommended acquisition of the Oxley property was based solely on the fact that residential use was incompatible with the Airport; acquisition was not based on any Airport need for the property. (TR. 344, 345, 491, 537 and 570.) In September, 1982, the Airport Authority informed Oxley that it would begin appraisal of his property for purposes of determining the fair market value of the property, and that an offer to acquire his property would be forthcoming. (DX 6, PX 40.) In January, 1983 the Airport Authority offered to purchase Oxley's property for $1,500,000.00. (PX 33.) Oxley did not just reject the offer, he responded that his land was "not for sale." This position was surprisingly contrary to the one that he had repeatedly taken in the 1960's and 1970's. (TR. 182, DX 2.)

Oxley moved to develop his property and had it rezoned for light industrial and commercial uses, which were compatible with Airport-related noise levels.

The reason for the dramatic change in Oxley's position with respect to sale of his property was that he had made a deci-

sion to develop his property for light industrial and commercial purposes. (TR. 182, 183, 193 and 194.) It was at this time that the Airport Authority learned that Oxley was seeking to rezone his 60 acres from an agricultural classification to a light industrial/commercial classification. (TR. 513.)

In March, 1983 Oxley's attorney informed the Airport Authority that Oxley and an on-airport operator named Jandebeur were contemplating industrial/commercial development of the 60 acres that would involve Airport-related activities. The Airport Authority was informed that Oxley and Jandebeur desired to construct an access ramp to the Airport runways and taxiways that would tie Oxley's property into the Airport. (TR. 346, 347, DX 3 and PX 30.) Since the access ramp would pass through the perimeter/security fence that surrounds the Airport, the operation was referred to as a "through-the-fence operation." (TR. 479.) Oxley's attorney requested a description of the conditions for access through the fence and for use of Airport facilities, including taxiways and runways. (TR. 347 and 349.) The Airports Director responded in a letter by presenting a general outline of the terms that would be included in any through-the-fence agreement. The Airports Director qualified that any such operation would be subject to negotiation with the Airport Authority. The Airports Director invited Oxley to contact him for any further information. (TR. 348, 349, 350-351 and 352; PX 31.) Jandebeur thought the terms of the letter were reasonable; as a businessman, he knew that the through-the-fence agreement would be subject to further negotiation with the Airport Authority. (TR. 633, 634 and 636.)

After receipt of the letter, Oxley expressed no objection to the preliminary outline of terms set out by the Airports Director. (TR. 190, 423, 424, 472 and 583.) However, at trial, Oxley complained that certain terms set out in the letter were unrea-

sonable. He stated that, as part of the contemplated through-the-fence agreement, the Airport Authority wanted to charge as high as 85% of his gross revenues. (TR. 192.) But, under cross examination, Oxley admitted that no such percentage figure was stated in the letter, or in any other communication, written or verbal, from the Airport Authority, but that this exorbitant figure had been given to him by his attorney. (TR. 198.) Furthermore, Oxley admitted that all the terms set out by the Airports Director were reasonable. The position of the Airport Authority was simple: For use of Airport facilities, Oxley would have to pay the same rate charged other users. (TR. 437 and 530.)

After the exchange of letters by Oxley's attorney and the Airports Director, the Airport Authority met in July, 1983. In the meeting the final version of the ANCLUC Study was adopted. (TR. 313 and PX 11.) At that time, since no further communication had been received from Oxley regarding development of his property, the Airport Authority, based upon the noise compatibility recommendations of the ANCLUC Study, voted to move forward on acquisition of certain properties, including the Oxley Property. (TR. 423, 424, 472, 583 and PX 11.) After the July, 1983 meeting of the Airport Authority, Oxley proceeded with rezoning his 60 acres from an agricultural classification to a light industrial classification. In November or December, 1983, more than five months after receipt of the Airports Director's letter, and more than four months after the July meeting, the zoning process was completed and Oxley's attorney secured the new industrial zoning classification. (TR. 472, 473 and 577.)

The Airport Authority decided not to condemn the Oxley Property.

Based on the new industrial zoning classification and the expressed intended use of the property for commercial/industrial purposes, the Airport Authority did not proceed with acquisition of the property by condemnation. (TR. 313, 406, 407, 408, 577, 578, 579, 581 and 582.) Unfortunately the development deal with Jandebeur fell through. Due to a recession in the Oklahoma economy, Jandebeur became cautious and the option to develop Oxley's property was never exercised. (TR. 634, 635 and 636.)

Oxley sued the City of Tulsa for inverse condemnation.

On February 14, 1984, Oxley decided to obtain the full light industrial/commercial value of his property by other means—by filing the present lawsuit. In the action below, Oxley sought to prove that the entirety of his fee simple ownership in the 60 acre tract of land had been taken by virtue of Airport operations on February 14, 1984. Oxley sought to obtain the full value of the property for its highest and best use; he did not seek compensation based on the less valuable residential use, a use which had not been practical for years. (TR. Petition and Amended Petition.)

Oxley based his inverse condemnation action on three different sets of facts. The primary basis was that Airport noise levels interfered with use of the property for residential purposes. (TR. Petition and Amended Petition.) Second, Oxley alleged that the Airport intended to take his property, as demonstrated by the ANCLUC study and a subsequent acquisition offer. Oxley contended that these activities constituted an implementation of the recommendations of the ANCLUC study and Master Plan Update and, as such, were unequivocal acts to

take his property which precluded his development of the property for its highest and best use for light industrial/commercial purposes (even though Oxley testified at trial he was not even aware of the studies until after filing of the lawsuit). (TR. 147 and 148.) Finally, the lawsuit was based on a third contention that the letter written by the Airports Director on June 1, 1983, constituted a denial of access to the Airport taxiways and runways. (The testimony at trial was uncontroverted that Oxley had never been denied access.) (TR. 204, 531, 582-583.)

Pretrial Proceedings.

At pretrial the trial court determined that the trial would be divided into two phases, with the first phase on the issue of *de facto* taking and the second phase on the issue of the extent of the taking. The trial court sustained the City of Tulsa's motion *in limine*, ruling that evidence as to Master Plan implementation and alleged denial of access did not constitute a legal basis for *de facto* taking. (TR. 37, 39, 40 and 43.)

Oxley acquiesced to the court's stated trial procedure. He made no objection to the court's ruling. (TR. 55, 56, 57 and 94.) During the trial, Oxley did not make any formal offers of proof regarding the evidence objected to in the motion *in limine*. (TR. 131 and 132.) Finally, Oxley did not object to the trial court's charge and instructions to the jury which limited the question of taking to whether noise, odors and vibrations had substantially interfered with use of the Oxley property. (TR. 892-901.)

Trial.

At trial on March 23-April 3, 1986, the City of Tulsa did not dispute that residential use of the Oxley Property was not suitable on the alleged date of taking, February 14, 1984. (TR. 82.) In fact, the City of Tulsa agreed with Oxley that, even though he still received substantial rental income from the prop-

erty (DX 1), residential use of the 60 acres had been impractical and unsuitable since the 1960's or even earlier. (TR. 792, 812-813, 831-832, 834-835.) The City's position was that the 60 acres was increasingly valuable to Oxley as owner of the property. (TR. 800, 815, 816 and 887.) Due to its location, the property was ideal for light industrial and commercial development; the land was the closest and largest privately-owned tract near the Airport, one of the largest and most profitable commercial complexes in the State of Oklahoma; the property was fronted by a four-lane highway and was close to major freeway systems. (TR. 800, 815-816, 862, 863, 887, 443, 446.) Furthermore, the City proved through competent evidence that Oxley retained substantial and increasingly valuable ownership interests in the land such as title, possession, access, and rights of development, encumbrance, sale and lease of the property. (TR. 160, 161, 820, 821, 824 and 825.) Finally, there was substantial evidence at trial that the highest and best use of the property—light industrial/commercial purposes—was compatible with the Airport and the noise levels generated therefrom. (TR. 474, 577, 578, 793 and 794; *also see* pp. A34-A35 of petition for writ of certiorari.)

Oxley sought to prove that, even though the property was suitable for light industrial/commercial development, the Master Plan and ANCLUC study for the Airport interfered with his development of the property for those purposes. (TR. Petition and Amended Petition, 148.) However, in cross examination, Oxley admitted he was not even aware of these studies until his attorney told him about them after the lawsuit began (after the taking of Oxley's deposition in which he said the property was suitable for such development.) (TR. 148). At trial it was established that adoption and implementation of a Master Plan restricting certain uses in noise sensitive areas

would have no adverse effect on the types of light industrial/commercial development to which the property was best suited. (TR. 408 and 409.)

SUMMARY OF ARGUMENT

The test of whether a governmental taking of private property has occurred within the meaning of the Oklahoma Constitution involves a factual determination of whether there has been substantial interference with the landowner's use and enjoyment of his property. The question of whether there has been "substantial interference" is a question for the trier of fact.

In this case the landowner claims a *de facto* taking of his fee simple interest in property adjacent to an airport due to three causes: (1) adverse airport conditions (airport noise, fumes, vibrations and overflights), (2) denial of his access to the airport, and (3) adoption of a Master Plan and noise study by the City of Tulsa which he claimed had the effect of prohibiting all viable use of his land.

The landowner presented all of his evidence to a jury. The jury returned a verdict that, as a matter of fact, there had been no substantial interference by the City of Tulsa with his use and enjoyment of the fee simple interest in his land. Thus, his property had not been "taken." On appeal the Oklahoma Supreme Court affirmed the trial court.

The evidence was uncontroverted at trial that the highest and best use of the land is for industrial/commercial purposes. The "adverse airport conditions" did not hinder the use of the land for industrial/commercial purposes. The allegations of denial of access and regulatory limitations purportedly imposed on the landowner were without factual support on the record.

ARGUMENT

Oxley asserts two reasons that certiorari should be granted:

1. The jury should have found that a taking occurred under OKLA. CONST. art. II, § 24, since adverse airport conditions (noise, overflights, etc.) coupled with an alleged denial of access to the Airport constituted a substantial interference by the City of Tulsa with Oxley's use and enjoyment of his property; and

2. The jury should have found that a taking occurred since the City of Tulsa's adoption of a Master Plan and acceptance of a noise study precluded Oxley from all economically feasible uses of his property.

RESPONSE TO PROPOSITION 1

In his first proposition, Oxley essentially argues that the jury should have found that the fee simple interest in his property was taken by inverse condemnation under the Oklahoma Constitution since airport conditions (noise, fumes, vibrations and overflights) coupled with an alleged "denial of access" to the Airport constituted a substantial interference with the use and enjoyment of his property:

> [T]he combined effects of airport conditions and anti-competitive conduct were properly before the jury for its decision as to whether there had been a substantial interference with a protected property interest . . . [T]he unbearable living conditions generated by airport operations appropriated an avigation easement by virtue of their immediate interference with a protected property interest [satisfying the "immediate interference" test of *U.S. v. Causby* and *Griggs v. Allegheny County*, and]; . . . [T]he anti-competitive regulation of the property . . . effectively precluded all use of the property . . . Petition for writ of certiorari at 16, 17.

The standard for a "taking" by eminent domain under the Oklahoma Constitution is less restrictive than the "taking" standard under the United States Constitution.

Under the Oklahoma Constitution "[p]rivate property shall not be taken or *damaged* for public use without just compensation." OKLA. CONST. art. II, §24 (Emphasis added.) The test for a taking is "whether there is sufficient interference with the landowner's use and enjoyment to constitute a taking." *Henthorn v. City of Oklahoma City*, 453 P.2d 1013, 1015 (Okla. 1969). Whether there has been "substantial interference" is for the trier of fact. *Henthorn*, 453 P.2d at 1016.

Under the United States Constitution, there must be an actual deprivation of all rights in and to the property in order to constitute a compensable taking of a fee simple interest. "Damage" to property does not result in a fee simple taking. U.S. CONST. amend. V, amend. XIV. *See e.g., United States v. Causby*, 328 U.S. 256 (1946).

In the case below, Oxley urged a "taking" under both the Oklahoma Constitution and the United States Constitution. By alleging the Oklahoma constitutional standard, the jury was permitted to find that a *de facto* taking of the property had occurred by substantial interference with the use and the enjoyment of the property—nothing more was required.

It should be noted that Oxley alleged a *fee simple* taking. Footnote 4 of the Oklahoma Supreme Court's opinion precisely addresses why Oxley is wrong in his complaint of a *de facto* taking by reason of interference with residential use only. A landowner alleging inverse condemnation must "prove a significant impairment of the fee estate of the property rather than impairment of a single use, i.e.: residential." But Oxley "*voluntarily and with full knowledge regarding the airport's intentions* and

the reasons for those intentions elected to have his property rezoned to a compatible use. Oklahoma and other jurisdictions have recognized the doctrine of 'estoppel by acquiescense.' " Opinion of Oklahoma Supreme Court below at A-7 of petition for writ of certiorari, n. 4; Emphasis in original. In accordance with Oklahoma Constitutional law (*see Henthorn v. Oklahoma City*, 453 P.2d 1013 (Okla. 1969)), the question put to the jury was whether there was sufficient interference with the landowner's use and enjoyment to constitute a taking. The jury was instructed, without objection from Oxley, that there must be a substantial interference with the use and enjoyment of one's property in order to constitute a *de facto* taking.

As to the denial of access contention of the first proposition, Oxley did not present any evidence:

> "[Oxley's] assertions that the airport imposed unreasonable restrictions on through the fence operations and engaged in other "discriminatory" and "anti-competitive" practices, are all without factual support in this record." Oklahoma Supreme Court Opinion, at page A-9 of petition writ for certiorari.

Using the broader Oklahoma constitutional standard, the jury, after considering all of Oxley's complaints of adverse airport conditions and Oxley's factually unsupported assertion that he had been denied access to the Airport, concluded that, as a matter of fact, there had been no substantial interference with the use and enjoyment of Oxley's property. Hence, there was no "taking."

A jury verdict based upon jury instructions correctly stating the applicable constitutional standards has been rendered. That verdict is supported by the evidence and the law. There are no special or important reasons for granting certiorari; there is simply no federal question presented.

RESPONSE TO PROPOSITION 2.

In his second proposition, Oxley argues that the jury should have found that his property was taken by inverse condemnation since the City of Tulsa adopted a Master Plan and accepted a noise study, which together precluded Oxley from all economically feasible use of his property.

In his second proposition, Oxley appears to urge that the terms of the Master Plan and the noise study result in regulations which prohibit all use of Oxley's property thus resulting in a compensable "taking" of his property:

> The implementation of the Master Plan and ANCLUC policy recommendations and the irrevocable commitment to the expansion of the airport are the unequivocal and overt acts which have caused an immediate and substantial interference with protected property rights which, in turn, lead to the effective exercise of dominion and control over the land which precludes all reasonable use thereof. Petition for writ of certiorari at 21.

However, the Oklahoma Supreme Court considered the Airport Authority's actions, including implementation of the Master Plan and the noise study, and held that all allegations as to "discriminatory" and "anti-competitive" practices, were simply "without factual support in this record." Opinion of Oklahoma Supreme Court, at A-9 of petition for writ of certiorari. Thus, the Oklahoma Supreme Court was compelled to affirm the jury's verdict that, as a matter of fact, there had been no substantial interference with the use and enjoyment of Oxley's property by reason of the Master Plan implementation, the noise study adoption, or any other facts. Furthermore, in the trial record, there is *no evidence* that any regulation resulted in an "overt act leading to exercise of dominion and control

over [the] property upon which to base a de facto taking." *State ex. rel. Department of Highways v. Cook*, 542 P.2d 1405, 1407 (Okla. 1975). *Also see* opinion of Oklahoma Supreme Court at page A8 of petition for writ of certiorari. Once again, a jury verdict which was based upon jury instructions correctly stating the applicable constitutional standards, has been rendered. The jury verdict is supported by the evidence and the law. There are no special or important reasons for granting certiorari. There is no federal question presented.

CONCLUSION

For the reasons set forth above, the respondent submits that a writ of certiorari should not be granted in this case.

Respectfully submitted,

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JANUARY, 1990